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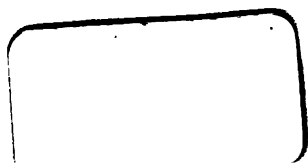
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HISTORY
OF THE
ENGLISH LAW,
FROM THE
TIME OF THE SAXONS,
TO THE END OF
THE REIGN OF PHILIP AND MARY.

BY JOHN REEVES, ESQ.

BARRISTER AT LAW.

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HISTORY OF THE ENGLISH LAW.

CHAP. XXIV.

HENRY VI. EDWARD IV.

*Of the Canon Law—Of Bishops—Officials—Of Things—
Of Offences—Of Proceedings in Civil Suits—The Li-
bel—Litis Contestatio—Dilationes—Missio in Bona—
Of Sequestration—Of Proof—Of Witnesses—Of Excep-
tions—Appeals—Of Proceedings in Criminal Suits—
Accusation—Inquisition—Denunciation—Purgation—
Excommunication—Interdict—Suspension.*

WE cannot dismiss the reigns of these two kings, without introducing the reader to some slight acquaintance with the law and practice of our ecclesiastical courts. We are aware, that such an undertaking must be attended with some difficulty and hazard; and that, in attempting it, we shall deviate from the line that has been invariably pursued by writers on the law of England. All writers upon our law, from Bracton down to Blackstone, have calculated their performances for the practicers in the courts of common law, and have accordingly taken no other notice of the clerical courts, than as their jurisdiction had, at various times, interfered with that of the

temporal courts. Without disputing the propriety of such writers circumscribing their enquiries, the juridical historian may be allowed to carry his views a little further. Considering the ecclesiastical courts as employed in the administration of justice equally with the temporal, he will esteem the law of each to constitute only different parts of the *English Law*, and to demand a proportioned share of his attention. The progress of our historical enquiry makes it now necessary to turn our thoughts with more earnestness to this part of our subject. We are approaching the reign of Henry VIII. in which many parliamentary regulations were made for reforming our ecclesiastical polity, and questions of a serious nature with regard to the proceedings of the clerical courts were brought forward and discussed with great heat during that reign, and those which immediately succeeded it. It would therefore be proper, conformably with the method which has hitherto been pursued, not to carry on the reader to so important a crisis in the history of our ecclesiastical courts, without previously possessing him of such leading circumstances in the form and conduct of that judicature, as will enable him easily to apprehend the effect of such alterations, and the scope of such controversies.

The present seems more particularly marked as the period for enlarging on this branch of our enquiry, by the appearance of our famous canonist Lyndwode. Whatever doubts might hitherto have existed concerning the nature of the jurisprudence which prevailed in the clerical courts, they seem all removed by the works of this author. In the *Provinciale*, and the Gloss upon it, we not only have a view of such constitutions as were made in this kingdom, with the interpretation put on them by that experienced practitioner and judge; but we collect from him, that the oracle to which recourse was had in all cases where our constitutions were defective or doubtful, was the body of pontifical canon law. Thus are we enabled to say,

upon incontestable authority, *what* the ecclesiastical law of England was in the reigns of Henry VI. and Edward IV. and for many years after. Instead therefore of dwelling on the boundaries between the temporal and ecclesiastical jurisdictions, the *debatable ground* which we have fought over so often in the former parts of this History, we shall now pass the borders, and explore this obscure region of ecclesiastical jurisprudence.

But before we proceed to examine the nature and extent of our national ecclesiastical law, it will be proper to take a short view of the canon law; which was the original our doctors copied in every improvement they made in the law and practice of their courts. The understanding of that system appears to be the best introduction to a knowledge of our own,

The canonists, in imitation of the Roman lawyers, and as the subject naturally dictates, divided the canon law into such as regarded the rights of persons and of things, the proceeding in civil suits, and the prosecution of crimes. The rights of persons, as they presented themselves to the mind of a canonist, were confined ^{Of the canon law.} to their clerical character and function. The duty, rank, and privileges of all persons, from the pope and bishops down to those in the most inferior situations in the church, constituted this part of the canonical jurisprudence. Without entering minutely into this enquiry, we may content ourselves with a short statement of the gradation of persons who filled the clerical state, and who having been mentioned frequently in the course of this work, ought to be better discriminated than they have yet been. The whole people of the country being divided into lay and ecclesiastical persons, or clerks, they subdivided clerks as follows: into those who were *in sacerdotio*, those who were *in sacris*, and those who were *nec in sacerdotio nec in sacris*. Those *in sacerdotio* were divided into such as were *in altiori gradu, seu ordine*; and those *in inferiori*: in the former

were bishops, archdeacons, and archpresbyters; in the latter were presbyters or priests.

Of bishops.

A bishop, simply so called, presided over a single city with a diocese: a *metropolitan* (sometimes called an archbishop) presided over a province containing several cities. An archbishop, or primate, was a bishop to whom the metropolitan and the other bishops of the province were subject: these latter were in some places called patriarchs. The pope was reckoned among the order of bishops, with a supreme authority over them all. The *cardinals*, from whom the pope was elected, were considered as his senators, and constituting, as it were, the *senatus ecclesiæ*: some were cardinal deacons, others cardinal priests, others cardinal bishops; but each cardinal had nearly an episcopal jurisdiction (a).

All bishops had an ordinary jurisdiction, which was of three sorts. One was *jure ordinis*; as the consecration of churches and altars, and the ablution and purgation of them after pollution; the making of the chrism, and the ordination of clerks. The second was *lege jurisdictionis*; as the power of correcting, collating, excommunicating, instituting; taking cognisance of and hearing causes ecclesiastical. The third was *lege diœcesanâ*; as the right of exacting procuration; the *jus cathedralicum sive synodaticum*; and the right of exacting and receiving pensions and tythes. All these powers could be exercised only in the bishop's own diocese, over those immediately subject to him; and that in person, or by proxy. Thus, too, an archbishop's authority went no further than his suffragans, and not to the subjects of his suffragans, except in a few cases; nor could a patriarch interfere in the causes of those who were subject to a bishop or archbishop, unless by some custom, or upon appeal. But the Roman pontiff alone could exercise episcopal jurisdiction over

(a) Corr. Jus Can. 5, 6, 7. Laune. Inst. Jur. Can. lib. 1. tit. 4.

all churches and all christian men, either at Rome or elsewhere.

To ease the bishop in the discharge of his pastoral care, certain persons used to be appointed; some of them in the church, as an *archdeacon* and *archpresbyter*; some of them *extra ordinem*, upon particular emergencies, as a *coadjutor* or *vicar*. An archdeacon was, by his office, next to the bishop, and took upon him the whole care and duty of the bishop *tam in clericis quàm in ecclesiis*, having the whole episcopal cognisance and ordinary jurisdiction (a). An archpresbyter, or chief-priest, was more exalted than other priests, and was vicegerent to the bishop *in spiritualibus*. He was either *urbanus*, discharging his duty at home in the cathedral church; or *rural*, doing the like duty at a distance: the latter was sometimes called a *decanus*, or *dean*, because he presided over *ten* clerks living in the country. He had the charge of all lay persons and priests who had churches within his deanery, and gave notice to the bishop of heavy offences. Archpresbyters had only a voluntary and not a contentious jurisdiction (b). A *coadjutor* was occasionally appointed to be vicegerent to a bishop or an archdeacon, in case of sickness or any other impediment: the bishop chose such a person by the advice of his chapter. Bishops also, and other clerks, might chuse a vicegerent under the denomination of *vicar*, to act for them in any emergency; and might assign him a portion of their church or benefice, as a reward for his trouble. Such persons were appointed either to do divine service, and then they retained the name of vicar; or they were appointed *ad jurisdictionem exercendam*, and then they were called *officials*, and *missi domini*. Officials.

The former kind were the vicars which have been before mentioned in the reign of Henry IV (c).

The latter had the power of administering spirituals as well as temporals: thus they might excommunicate, sus-

(a) Cerr. Jus Can. 26, 27, 28. (b) Ibid. 29, 30. (c) Vid. ant. vol. III. 222.

pend, interdict, collate, institute, confirm, elect, present, visit, correct, punish, dispense, and the like. Their jurisdiction was not deemed a delegated one, but ordinary, and the same as that of the bishop; so that an appeal did not lie from the sentence of the vicar to the bishop, but to the archbishop; though from the archdeacon and other inferior prelates, the appeal was to the bishop. This, however, was to be understood of *officials principal*, who were constituted by the bishop in his court by a general commission of his office; not such as were appointed for some part of a diocese, who were called *foranxi*. These latter had a different jurisdiction from that of the bishop, and an appeal lay from them to the bishop's consistory. It was a rule, that a vicar could not substitute another vicar in his place (a).

Having said this much on the vicars appointed by bishops, we should add a word respecting those who received a vicarial authority from the pope: these were called legates, and were either *legati à latere*, *legati missi*, or *legati nati*. The former were cardinals taken, as it were, from the side of the pope and his senate, who were sent in his name into distant provinces; the second were persons sent with like authority, not being cardinals; the last were such as had this power by reason of a certain privilege or benefice. These vicars carried with them all the pope's authority to hear all causes as *judices ordinarii*; but a certain eminence was always attributed to the legate à latere (b).

Bishops were *sacerdotes* in the higher order: we now come to those in the inferior, which were *presbyteri*, or priests. Next to these come clerks that were not *sacerdotes*, but yet were *in sacris*; as *deacons* and *subdeacons*, who were sometimes, though improperly, called priests; for priests, strictly speaking, were those only, who, in the

(a) *Vicarius non habet vicarium.*

Corr. Jus Can. 31, 32.

(b) *Ibid.* 34, 35.

language of the canons, could perform the sacrifice of the body and blood of our Lord. The deacons, consistently with the original term (a), were to attend upon and assist the bishop and priest in performing the divine service; and the subdeacon was a subordinate assistant (b). After these followed what the canonists called the *lesser orders*, containing those persons who were *nec in sacerdotio, nec in sacris*. These were ordained without the sacramental unction, solely by the bishop's benediction, with a certain distribution either of vessels or vestments, and they underwent the *prima tonsura*. They were called either *psalmistæ*, *ostiarii*, *lectores*, *exorcistæ*, or *acolythi*. The duty of the first was to sing; of the next, to keep the keys of the church; the next, as the name imports, were to read the scriptures in church; the next, according to the superstition of the times, were supposed to drive away evil spirits by certain deprecations and solemn prayers; and the last prepared the wax-lights, and the like.

It was the privilege of all these orders, that no one should lay violent hands upon such as had received them, without incurring the penalty of excommunication, which could not be removed but by the pope, except in the article of death. Those in the lower orders were allowed to contract matrimony, which those in the superior orders were not, under pain of being deprived of their benefices. The gradation in which these several orders were ranked by the canonists, was this: a bishop, a priest, deacon, subdeacon, psalmist, acolyth, exorcist, reader, ostiarius; after these the canonists placed an abbot, and a monastic; for, say they, all monastics, if not clerks, are inferior to clerks (c). The regulars, as they were exempted from episcopal jurisdiction, were not favoured by the clerical courts, and the dispensers of justice there; and they are studiously marked by the canonists as a distinct set of persons, not intitled to the privileges of clerks.

(a) *Διακονοι*.(b) *Corv. Jus Can.* 37.(c) *Ibid.* 38, 39.

Next to the rights of ecclesiastical persons, the canonists proceed to consider the rights of ecclesiastical things. These they divided into *spiritual* and *temporal*. The former were so called, because instituted *animæ causâ*, for the good of men's souls; some of them were corporeal, as the sacraments; others, *res sacræ et sanctæ*; and others *res religiosæ*.

The sacraments in the Romish church were seven: baptism, confirmation, the eucharist, penance, sacred orders, matrimony, and extreme unction. *Res sacræ et sanctæ* were churches, altars, the reliques of saints, vessels, and vestments. *Res religiosæ* were religious houses; hospitals for the reception of strangers, orphans, sick and aged; churchyards, and sepulchres. Such were spiritual things of a corporeal nature. Those of an incorporeal kind were such as consisted *in jure*; as a prebend, a right of patronage, annual pensions called *census*, and what was nearly allied to them, exaction, procuration, and the canonical portion: these constituted the whole of what the canonists considered as spiritual things, whether corporeal, or incorporeal. Next to these followed three subjects of a mixed nature between spiritual and temporal; as tithes, first-fruits, and oblations; which were considered as mixed, because, according to the canonists, the right to them was *jure divino*, while the fruit of such right was temporal. Under the title of *res ecclesiæ temporales*, the canonists reckoned the alienation of church property, and the modes in which it could be made. Next to church property, the canonists considered the *peculium clericorum*, and how they might dispose of it by will (*a*).

The next object that came under the contemplation of the canonists, was the mode of proceeding in court, which they entitled *de judiciis*. Concerning this we shall have oc-

(a) Cerr. Jus Can. 57 to 164. Launc. Inst. Jur. Can. lib. 2. per totum.

casion to speak so particularly hereafter, that nothing need be said on it at present ; but we shall proceed to the fourth object of enquiry in the canon law, which is the nature of crimes. The canonists divided crimes into *Of offences.* such as were comprehended in the first and in the second table of the Mosaical law. Without any observation upon this arrangement, we shall take a cursory view of crimes, as discoursed on in this clerical system of penal jurisprudence.

They began with simony, which, by a very large definition, was when any thing was either given or promised for spiritual things, or for temporal things annexed to spiritual ones, as a prebend. Next to this were the crimes of Judaism, Saracenism, heresy, schism, apostacy; then homicide, which they divided into parricide and simple homicide; under which they considered those exercises or competitions that had a tendency to produce homicide, as tournaments, duels, and the art of shooting, all which were forbid under ecclesiastical penalties; the crime of adultery, *stuprum*, incest, rape, simple fornication, and sodomy; theft, *rapina*, or robbery, burning, sacrilege. Next to robbery and theft, the canonists chose to rank usury, as an offence, say they, of a similar nature; then the *crimen falsi*; then *sortilegium*, *calumnia*, collusion. After these they placed such as were offences only in clerks. If a clerk indulged himself in the noisy amusement of hunting; if he struck any one; if he spoke ill of any one; if he administered to a person excommunicated, deposed, or interdicted; if a person officiated as clerk not being ordained; if a clerk did not observe the regular gradation of orders, as if he was made a deacon before he had been a subdeacon, or a priest before a deacon; if he took more orders than one at a time, or took orders by stealth, without undergoing an examination of his qualifications; all these were offences punishable by the canon law. To these may be added all disorders and irregularities what-

soever committed by clerks in the discharge of their duty (a). The manner in which all canonical crimes were to be prosecuted, was the next point considered by the writers on the canon law.

We have given this sketch of the canon law in a cursory way for two reasons: first, because many objects of judicature which the canonists claimed, made no part of the ecclesiastical law in this country: secondly, because others, which were admitted to belong to our courts, received, notwithstanding, some alteration from our national constitutions or customs. What such alterations were, and what constituted objects of jurisdiction in our spiritual courts, will be considered in the next chapter. For the present we shall be employed on a part of the canon law, which being adopted in our courts with less reserve, demands a more minute consideration than any other. This is the course of judicial proceedings, whether civil or criminal.

Of proceedings in civil suits.

The cognisance of causes, or, as the canonists called it, *judicium*, was divided into *ordinary* and *extraordinary*, or *summary*. The former was, when all the solemn forms of proceeding were observed by a libel, contestation of suit, and the other steps which will be mentioned presently. The extraordinary, or summary, was, when the solemn forms were dispensed with, and they proceeded *ex officio judicis*, either by inquisition, denunciation, or some other course *de plano*, as they termed it, upon general principles of equity. Another division corresponded with that of the temporal jurisdiction, into *civil* and *criminal*.

Judges, in like manner, were considered by the canonists in two lights, ordinary and extraordinary. Of the former description were archbishops, bishops, legates, and others having authority from the pope. A bishop might exercise his jurisdiction in any part of his diocese that was

(a) Corv. Jus Can. 287 to 344. Leunc. Inst. Jur. Can. lib. 4. tit. 3. usq; ad tit. 10.

not exempt, either in person or by another, by hearing all ecclesiastical causes, and correcting all ecclesiastical persons who offended. An archbishop had jurisdiction over his suffragans, but not over the persons within the dioceses of his suffragans, unless in some special cases that were exempted. An extraordinary judge was an *arbiter* chosen by the parties; or a *delegate* who received commission from some superior to hear a particular cause. A judge might be delegated by an ordinary, or by a delegate of the pope; but the delegate of an ordinary could not delegate another, unless the original delegation had included all causes in general. It was not only the cognisance of a cause generally, but any part of the proceeding that might be delegated: thus the beginning, as the citation, and *litis contestatio*, might be delegated to one; the middle, containing the remainder down to the definitive sentence, to another; the definitive sentence and execution to another (*a*).

In considering the nature of proceedings in the ecclesiastical court, we shall begin with civil causes, and with the ordinary jurisdiction. The commencement of a civil suit in the ordinary jurisdiction, consisted in the citation of the defendant, or *reus*. Citations were of different kinds; they were verbal or real. A verbal citation was either public or private. A public citation was by fixing up publicly the letters of citation, (which too was called *edictalis citatio*) or proclaiming them by the mouth of a crier, or by a bell or trumpet. A private citation was, when a person was cited by a messenger, the party, or a notary at his own house. It was called a real citation, if the person of the party was apprehended. The *citatio edictalis* was to be made use of only where a person could not be otherwise cited: as if it was unsafe to attempt to come to him, this citation was to be affixed in some place near the domicil of the party, so that he might be reasonably supposed to have knowledge of it.

(*a*) *Cort. Jus Can.* 165 to 172.

To constitute a legal citation, it was necessary that it should be made at the command of the judge, by an apparitor, at the instance and request of the suitor; without which no judge could cite a person in a private suit, though he might in a public one. All parties interested were to be cited, unless, indeed, they were persons of dignity and rank; for such were not to be cited, *nisi veniâ prius impetratâ*, under a heavy penalty. A citation issued not only at the opening of the suit, but in the various stages of the cause, wherever any *cognitio* was to be made to expedite it. Every citation was to contain certain formalities: it was to have the name of the judge, the *nomen* and *cognomen* of the party cited, and of him at whose suit it issued; the cause of citing, the place of judgment, the day and *terminus* for appearing. The place need only be mentioned in cases where the judge was a delegate, because the ordinary's court was certain and known. A citation was to be made either by three *edicta*, at the interval of ten days each, or by one peremptory edict, containing the same space of time as the three *edicta*; and such peremptory time was not to be shortened by the judge but for some special cause expressed in the citation.

If the party was regularly and lawfully cited, he ought to appear, otherwise he need not; but an irregular and unlawful citation would be cured by a voluntary appearance. Indeed the party's non-appearance would be justified in many cases: as if he had been spoiled of the thing in question, and was not first restored to it; if he was hindered by his adversary; was cited to a higher tribunal; was detained by sickness, or other like cause: but as soon as such cause was removed, he was to present himself before the judge. As soon as a citation had issued and was served, or the service was prevented by the party himself who was cited, then the suit was considered in law as *lis pendens* (a).

(a) Corv. Jus Can. 172, &c.

It often happened that a cause once commenced, would go off upon an agreement between the parties: this was either by a *pactum* or a *transactio*, or by submission to an arbitrator. The two former, which may properly be considered as judicial agreements, were thus defined by the canonists: *Pactum*, say they, is *inter partes ex pace conveniens scripturâ, vel, sine eâ, legibus ac moribus comprobata sententia*. *Transactio* is defined, *rei dubiæ et litis incertiæ, æq; finitæ, aliquo dato vel remisso, conventa decisio* (a). From the terms *sententia* and *decisio*, as well as from the occasion on which the canonists mention these two agreements, they must be considered as having a sort of judicial sanction; and they naturally bring to the reader's mind the account we have given of a fine, in the early parts of our History (b). A submission to arbitrators was another way of compromising the subject of a suit: while an arbitration was depending, the jurisdiction of the judge was held to be suspended (c).

If the parties could not agree to compromise the matter in one of these three ways, they must resort to the judgment of the court; in order to which it was usual, first to appoint a *procurator*, or *proctor*, who was to act as attorney through the suit. Whether the appearance was by proctor or in person, the next step was for the complainant to state his cause of action. In summary causes, and some others, this might be done *viva voce*, without any writing, either by the advocate or in person; but in other causes it was to be done in writing, which was called *libellus*. A libel in civil causes was either *conventionalis*, or *postulatorius*; in criminal cases, *accusatorius*, or *querimonialis*. In the latter cases, a libel was to contain the day and year, the *nomen* and *cognomen* of the accuser and accused and of the judge, the crime, the time when it was committed, together with the *inscription*, which will be explained here-

(a) Corv. Jus Can. 181. 183.

(b) Vid. ant. vol. I. 148. This coincidence in the civil law (from which the canonists took it) has been noticed by Mr. Cruise, in his Essay on Fines.

(c) Corv. Jus Can. 187. A submission to arbitrators is called by the canonists *compromissum*: hence our word compromise.

after. A conventional libel, in like manner, was to contain the names of the parties, of the judge, and of the thing in question, with the quality of the action; though it was not indispensably necessary that the name of the action should be mentioned. The libel should be tendered by the *actor* both to the judge and the *reus* (a). If the *reus* made any answer, or denied a part, or the whole, this constituted a *litis contestatio*.

Perhaps the *reus* would rather chuse to meet the *actor* in some other way; for if he had any demand upon him, he might *reconvenire*, as they called it, that is, make a cross demand upon him (b). A *reconventio* was proper or improper: the former was such as was instituted at the beginning of the original cause, and went on *pari passu* with it; the latter was such as was made at any time before the conclusion of the cause. A *reconventio* was always to be before the same judge as the *conventio*, whether he was an ordinary or delegate; but not before an arbitrator, nor a judge of appeal; it might be had in all causes, except criminal, those of spoliation, and some few others. The matter of the *reconventio* was to be put into a libel before the *litis contestatio*, or immediately after, and then would go on with the original suit: indeed they were considered as one suit only; for they had the same parties and judge: there was to be one sentence; and if an appeal was prohibited in the first, it was prohibited in the second also (c).

Litis contestatio. When the preparatory parts of the action were gone through, then followed the *litis contestatio*, which the canonists called *ipsius iudicii principium et fundamentum*. It was truly the foundation of the judgment; for till that happened, there could be no examination of witnesses, nor definitive sentence; and the whole

(a) Corv. Jus Can. 187, &c.

(b) *Reconventio* is defined by the canonists to be *mutua petitio contra convenientem vel agentem, in eodem iudicio constituta*.

(c) Corv. Jus Can. 193, 194.

process, of course, was at a stand. The *litis contestatio* arose from the conflict between the intention of the *actor*, exhibited in his libel, and the answer of the *reus*, which ought always to be calculated to contest the matter there suggested. If the *reus* in his answer made a plain narration of a fact, not accompanied with a denial, there was no *litis contestatio*. A *litis contestatio* was regularly necessary in every cause that was conducted in the ordinary process, and not *de plano*, without the figure and solemnity of judgment. The effect of the *litis contestatio* was various: it perpetuated the jurisdiction of the judge, and the action, if temporary; no innovation could be made to the prejudice of either litigant; it prevented a prescription running; it made the matter in question litigious; and the *actor* could not alter his libel (a).

Notwithstanding what has just been said, there were some cases in which witnesses might be examined even before the *litis contestatio*. Thus, if there was any apprehension that a witness might die, or be long absent, the judge, whether ordinary or delegate, might admit him to be examined; and this was done both in civil and criminal causes; in the latter, it was not allowed in the absence of the other party; in the former, it was, if there was any danger in the delay; if not, the adverse party should be cited to see the witnesses sworn, and to tender interrogatories. Witnesses might be examined thus prematurely in the following cases: if it was a question merely spiritual, and involving no benefit to any private person, as the crime of heresy; if the public safety was endangered; if the state of the church was concerned; in a cause of denunciation or of appeal; if the appellee was contumacious; in a matrimonial cause, if the other party was maliciously absent; in a case of dilapidation or purgation; wherever any thing was to be done *ex officio judicis* in relation to an

(a) Corv. Jus Can. 195, 196, 197.

action, as concerning costs of suit ; and in all cases where the proceeding was simple, and *de plano*.

Witnesses might be produced in this manner both by the *actor* and *reus*, though under different considerations. The *actor* might examine if they were old or infirm, and he was not at liberty to bring his action just at that time, as where a debt was due on a condition not yet broken. The judge was to decide as to the age, infirmity, or absence of the witnesses. When the witnesses were so received, the *actor* was to bring his action within a year from the time at which he was entitled to an action, or at least denounce to the *reus* the receipt of the witnesses. A *reus*, without any suggestion of age, infirmity, or absence, might indifferently produce any witnesses, provided he had a ground of exception, which, though not sufficient to found an action, might be enough to bar the action he apprehended. Witnesses examined in this way were to be produced before the judge who was competent to the principal cause; the other party, as was before said, should be cited, unless the speedy death of the witness was apprehended; and then it might be, not only in the absence of the other party, but before a judge who was not competent to hear the principal cause (a).

After the contestation of suit, there were several steps to be taken before the definitive sentence could pass. These may be considered as of three kinds: first, the *juramentum calumniæ*; secondly, the *dilationes*; thirdly, the process against the *reus*. The *juramentum calumniæ*, or oath of calumny, was taken by both the parties litigant, who respectively swore, that the cause was commenced, and should be carried on and defended, *bond fide*, for the sake of justice, and with no malicious design. The judge could not impose this oath but at the desire of the other party; and should either refuse, the consequence was

(a) *Corv. Jus Can.* 197, 198, 199.

fatal; for the *actor* would lose his action, the *reus* the thing in question, as if he had confessed the demand. All litigants were liable to take this oath, and they might take it themselves, or by their proctors; but a proctor to take this oath should have a special warrant, and then he might swear, as the canonists expressed it, *tam in animam domini quàm suam*. It was to be taken, in all causes where any proof was to be made, whether in a criminal or civil suit. Besides swearing to the justice of their cause, they were also to swear that they had not given, nor would give, any thing to the judges or others, except the honorary rewards to the advocates, and the like lawful presents; and also that they would not require any proof which they did not think absolutely necessary (a).

The *dilationes*, or allowances of time for the performance of any judicial act, were termed *Dilationes*. either *legales* or *arbitrariæ*; the former being such as were ascertained by law; the latter being dependent on the pleasure of the judge, who made them longer or shorter according to the nature of the case, and the circumstances of the parties. These latter dilations were to be given by the judge sitting on the bench, in the presence of both parties; to the former the parties were intitled of course, though they might be qualified by the discretion of the judge. The usual occasions on which one or other of them were allowed, was for producing witnesses, for proving instruments, for purgation, for contestation of suit, and the like (b).

Some other circumstances were considered as species of dilations. Among these were *feriæ*, or such days as were always exempt from judicial proceedings of every kind; and the *ordo judiciorum*, by which the due course of hearing each cause was prescribed. Thus a principal cause was to be heard before one that was only incidental to it; a criminal cause was to be heard before a civil one (c). A

(a) *Corv. Jus Can.* 199, 200.(b) *Ibid.* 201.(c) *Ibid.* 205.

plus petitio, as they called it, might be reckoned among the *dilationes*: this was when the *actor* demanded more than he was by law intitled to; in which case he lost his action, and paid single, double, or treble costs, according to the nature of the excess in the demand (a).

One instance of the *ordo judiciorum* was, when a *petitory* (or, as we should say in English, an action upon the right) and a possessory cause concurred. Thus the *actor* going on in a *petitory* way, and the *reus* complaining, perhaps, of a spoliation, made a cross demand of a possessory nature, whether of the same thing, or of some other. If it was of the same thing, the possessory question was first to be determined; and that upon the right, though first brought, was to be suspended. If it was for a different thing, there was a distinction; for the possessory demand might be made either by way of reconvention, by way of action, or by way of exception: if in the first, then the two questions went on together, and there was only one sentence, as was observed before: if in the second way, then the possessory question was first to be determined, whether the person spoiled was sued civilly or criminally by the *actor*; for it was a rule, *spoliatus ante omnia est restitutus*: if in the latter way, the exception of spoliation was to be first decided, and then that upon the right. The person who sued for the right was at liberty, before the conclusion of the cause, to sue for the possession; though not after, unless for some special cause. If a person sued at once both for the right and possession, they were both determined by one sentence; and the person who lost upon the possession, might afterwards go upon the right (b).

A spoliation was defined to be *violenta possessionis privatio*. It might happen both with respect to moveable and immoveable things; to rights, and to benefices. If a judge unlawfully deprived any one of his right by judgment,

(a) Corv. Jus Can. 206.

(b) Ibid. 207.

it was construed a spoliation. A person who commanded a spoliation to be made, or who acknowledged it to be made in his name, or who received the thing from the spoiler, was held the same as the spoiler. A person spoiled might complain either by action, reconvention, or exception: in the first case, he was to be first restored; in the second, both questions were to be heard *pari passu*; in the third, he need not answer till he was restored. A restitution, if made, was to be with the fruits, and the loss sustained (a).

The next consideration is the process which⁺ issued against those who were contumacious. A person who was lawfully cited, and, being under no lawful impediment, did not appear in person, or by a proctor; or if he appeared, but did not conform himself, or departed without the judge's leave, in all these cases such person was held contumacious. A lawful citation (as has been shewn) was by three *edicta*, or one peremptory, containing the same space of time as the three edicts. The contumacy, whether of the *reus* or *actor*, (for he also might be contumacious) was punished differently, and according as there was a *litis contestatio* or not; and the judge need not inflict all the penalties at once, but one after another, as the party appeared less likely to submit himself.

If the *actor* did not appear at the time to which he had cited the *reus*, he was to pay costs to him, and could not have a new citation, without giving security for his own appearance at the new-appointed time. The *reus* also, if there had yet been no *litis contestatio*, might require that the *actor* should be cited; and if he did not then appear, that he himself might be admitted to make proof, and sentence be passed. If the *actor* was contumaciously absent after the *litis contestatio*, and all but six months of the *tempus instantia* (which was usually three years) was elapsed,

(a) Corv. Jus Can. 208. Layne Inst. Jur. Canon. lib. 3. tit. 10.

the judge, if the case was a plain one, might proceed to a definitive sentence, even in favor of the *actor*, provided the right was on his side; otherwise in favor of the *reus*, by absolving him, and condemning the *actor* in costs.

If the *reus* was contumacious, either a mulct was inflicted on him by the judge, or he was condemned to pay the *actor* his costs and other damages; or he was excommunicated, or suffered a *missio in bona*. A *reus*, if contumacious, was sometimes said to be *verus*, and sometimes *factus*: the first was one who being personally cited, or by three edicts, did not appear; or appearing, would not answer: the latter was one who had been only cited at his house; unless, indeed, the citation had been communicated to him by his friends or domestics^(a): and there was this difference between the two, that the latter might appeal, but the former could not.

Missio in bona. The *missio in bona* was different where there had been a *litis contestatio*, and where not. After the contestation, if the judge was not clear in the justice of the cause, he put the party into possession of the goods of the *reus*, so as to make him only the real and true possessor thereof, leaving to the absent *reus* to maintain a question upon the right. If the cause was a plain one, then he passed a definitive sentence. If there had been no contestation, as he could not properly come to the merits of the cause, there was only a simple *missio in bona*, which was done by means of a *decretum*. There was a first and a second *decretum*: by the first there was a *missio in possessionem bonorum*, merely for custody. This process might be had by all persons to whom there was an absolute debt due, not by those who had a debt only *sub conditione*; unless, indeed, where the party was a legatee. The *missio* was first into possession of moveables, then of immoveables, and lastly of incorporeal things. There was, however, a difference between a real and personal action. In a real action the *missio* was *in bona petita*, of which the party became the true

(a) Corv. Jus Can. 209, 210, 211.

possessor, and after a year, and not before, he might take the fruits : within the year, the *reus*, if he purged himself, might come, and on giving security to stand to the suit, and paying the costs, he would have restitution of the goods taken. In a personal action, the *missio* was in proportion to the debt, and the *actor* did not obtain possession, but only held it, together with the owner, in a sort of custody. The *reus*, whenever he appeared, so as it was before the second *decretum*, was to have restitution, upon giving security to stand to the suit, and refunding the costs.

The second *decretum* was not necessary for acquiring possession in a real action, for that we have seen was done by the first, but it was necessary in a personal one ; for by means of this, after the *reus* persisted in his contumacy, the *actor* was put into possession, so as to continue the true and unchangeable owner of the thing so taken. This did not issue till a year after the first *decretum*, and was at the prayer of the party. As in the former case, so here, restitution would be made if the party appeared, or gave security for standing to the suit, and paid the costs ; or indeed if any just impediment could be shewn to have prevented his coming. It seems to have been left to the discretion of the judge, in what manner he would order the things taken under a *decretum*. Thus, he might either order them to be sold, or to be delivered in payment of the demand ; if a debt, he might either make the *actor* real proprietor of them, or give him only possession. The process of *missio in possessionem* was allowed only in profane matters, not in cases where any dignity or benefice, or other ecclesiastical matter was in litigation ; for then, instead of this process, they either proceeded to a definitive sentence, or the contumacious party was pursued by ecclesiastical censures (a). It is for the reader to judge whether the framers of our real process by caption, as related in the early parts of this History, had any eye to this canonical proceeding (b).

(a) *Corv. Jus Can.* 211, 212, &c. *Launc. Inst. Jur. Can.* lib. 3. tit. 6.

(b) *Vid.-ant.* vol. I. 417, 418, &c.

Another way of proceeding in cases of contumacy, was by *sequestration*. This was depositing the thing in question, or the fruits of it, by consent of the parties; or by the authority of the judge, in the hands of a sequestrator, for safe custody, to be restored to the successful party in the suit; so that it was either *conventional* or *judicial*. That a person might not be deprived of the possession rashly, which was like beginning with an execution, this was confined to particular cases. If the judge apprehended that the parties might come to open violence; if the person who was *missus in possessionem* by a *decretum* was wasting the fruits and produce, and the like, such was a proper occasion for a sequestration. Things, whether moveable or immoveable, were subject to sequestration; though it would not be allowed of a benefice, if any question arose against a person who had been full three years in possession.

A conventional sequestration passed into what they called a *sequestral possession*, unless there was an agreement that it should only be for safe custody: and if it did, the sequestrator had all the advantages of possession; that of taking the fruits and produce, of presenting to benefices, and the like. A judicial sequestration did not convey the possession, but that awaited the definitive sentence. Any person who hindered the sequestration of an ecclesiastical benefice, or the receiving the fruits of it, incurred excommunication, from which he could be absolved only by restitution; and if he was one of the parties, he would lose the benefice, and whatever right he had therein(a). It should be observed, that the whole process for a *missio in possessionem*, and for sequestration, were exceptions to the rule, that *litę pendente nihil esset innovandum*, which was most rigidly adhered to in all other respects(b).

Thus far of the *reus*, when contumacious: the next considerations are when he came in and confessed, or denied

(a) Corv. Jus Can. 216, &c.

(b) Ibid. 216,

the charge against him. A confession consisted not only in a plain admission of the charge, but might be collected from circumstances, the strongest of which was silence. If, on interrogation, he should contumaciously refuse to answer, or should not deny the allegations of his adversary, this amounted to a confession. A confession had the force of a sentence; so as that the judge, if proceeding *de plano* without the form and solemnity of a judgment, need not pass sentence upon the person confessing; but if he was proceeding in the ordinary course, he must give sentence: the same also in criminal matters (a).

If the *reus* denied the libel, then the *actor* was required to prove it. Proof was divided into artificial and inartificial: the former was such as could be deduced by argument from the thing itself: the latter consisted in such things as were out of the cause; as witnesses, instruments, confession, an oath, and the like. Proof was again considered in two lights; either as *plena*, or *semiplena*. The first was such as wrought on the mind of the judge *plenam fidem*: such was a proof by two witnesses, by a public instrument, by presumption, the judicial confessions of a party, the evidence of the thing. The latter was such as had only an imperfect effect on the judge's mind, not producing such a faith as he ought to acquiesce in; as by one unexceptionable witness, a private instrument, comparison of hands, an extrajudicial confession, argumentation, report, and the like. However, several half proofs might be so put together as to make one full proof; as where they tended to one end, and not to several; and this, whether they were of the same kind, as two witnesses; or of different kinds, as one witness, and a report. But if these proofs went to different objects, as one witness to prove a report, another to prove a flight,

(a) Corv. Jus Can. 218, &c.

it would not suffice; because, to make a full proof, each ought to be proved by two witnesses.

In some cases, the canon law was content with something less than proof, where a probable presumption could be raised; as in a case of simony, which was always committed in secret. Proof consisted either in witnesses, confession, instruments executed with due solemnity, the evidence of the fact, report, antient books, and writing on stones or columns, letters under the seal of a bishop, cardinal, abbot, or chapter, common opinion, *indicia indubitata*, violent presumption. If the actor brought a full proof, he need not take an oath himself (a). Two sorts of proofs, that which consisted of witnesses, and that which depended upon instruments, deserve more particular consideration: and first of witnesses.

Of witnesses. The competency of witnesses was measured by the canonists by much nicer considerations than any that operated in our law of evidence. The objections to a witness were such as were absolute, or such as applied only between particular persons. Of the former kinds were the following: that he was not arrived at puberty (unless indeed in cases of lèse majesty, where this was not an objection); that he was mad, or of non-sane memory; an infamous person, as an usurer, or one condemned by a public judgment; one who had been convicted of receiving money, either for giving or withholding his evidence; one condemned either for peculation, for a libel, calumny, or adultery; a heretic (but this was no objection where he was to give evidence against a heretic); a perjured person; a woman who was or had been a common prostitute; and all persons who were stigmatized by the secular laws.

Between particular persons, it was held that a domestic, a familiar friend, a relation by blood or marriage, one who could be influenced to be a partial witness; all

(a) Corv. Jus Can. 220, 221, &c.

these were prohibited from becoming witnesses for any person towards whom they stood so circumstanced, but not from giving evidence against him: nor were they prohibited from giving evidence in a cause for proving consanguinity, or any matrimonial matter. On the other hand, a person who had confessed himself guilty of a crime, could not be witness against an accomplice, except in certain heinous and more secret offences; as læse majesty, heresy, or simony: an enemy could not be permitted to be a witness against an enemy; a freedman against his patron; a son against a father, or a father against a son, unless in a matrimonial cause; nor a heretic or Jew against a christian; nor a layman against a clerk in criminal causes. A woman could not be witness to a testament; nor in a criminal cause, if instituted criminally, though she might if it was prosecuted civilly. No one could be witness in his own cause, nor could the advocate or proctor (a).

The number of witnesses ought at least to be two, whether in a civil or criminal suit; nor, say the canonists, would less be received even from a person of dignity and rank. The latter were great considerations in the article of testimony: thus to convict a cardinal bishop, seventy-two witnesses were required; a cardinal presbyter, forty-four; a cardinal deacon, twenty-four; a subdeacon, acolyth, exorcist, reader, ostiarius, seven; and yet, if the witnesses were of known good life and conversation, two or three, it was thought, might suffice even in these cases of such prodigious caution. Yet in the purgation of a bishop they invariably required twelve; of a presbyter, seven; of a deacon, three: three witnesses also were required to prove a will.

Although it was a general rule, that one witness, whatever was his dignity, could prove nothing; there were exceptions of cases where he was allowed, if no prejudice could happen to any one: as when it was doubted, whether

(a) *Corr. Jus Can.* 224, 225, 226.

a person was baptised, whether a church was consecrated, and the like ; when the will of a dumb or expiring person was to be proved ; when a marriage was to be destroyed by pretext of consanguinity ; and, as was before mentioned, in cases of læse majesty (a).

It was held, that a witness should not offer himself voluntarily, but should be called, and, as it were, brought in against his will ; and a person who came voluntarily, was considered as a suborned and suspected person. He was to be produced and received after the contestation of suit, and not before, unless there was an apprehension of his death or absence ; or unless it was in a cause of matrimony or election, or in a prosecution by inquisition or denunciation. The production should be before the judge who took cognisance of the cause, unless the witnesses were infirm, old, debilitated, or very poor, so as not to be able to come to the place where the judge was, for then they might be examined by proper persons who were to be appointed for that purpose (b).

Before the judge proceeded to the examination, he was to admonish the witnesses of the heinousness of perjury, and then require from them an oath. An oath was taken differently by different descriptions of persons : thus, by the canon law, all seculars swore, *tactis sacrosanctis scripturis* ; all regulars swore, *propositis evangeliiis, et manu ad pectus admotâ*. After the oath was taken, the judge was to examine the witness apart, without the presence of the parties, or any one, except the notary who was to take down the examination. The questions were to be formed upon the articles exhibited by the adverse party, and upon interrogatories or enquiries concerning the persons of the witnesses themselves : they were to be asked as to the occasion of their knowledge, the time, place, and the like ; to all which they were bound to answer (c).

(a) CORR. JUS CAN. 227.

(b) Ibid. 228.

(c) Ibid. 229.

A witness was not to depose upon his belief or hearsay, unless it was supported by something that corroborated, or where it was in case of some antient right, and he spoke from the reports of old people.

After the deposition was made, the judge was to read the whole, whether upon the articles or interrogatories, to the witness, that he might correct what he had said, and then he was to dismiss him with strict injunctions of silence. The judge was likewise to endeavour to prevail with the parties to renounce any further production of witnesses; otherwise they might, within the time allowed by the judge for production, go on to a third production of witnesses upon the same articles (a): but they could not make a fourth, unless the party took an oath of calumny, swearing that he did not do it for vexation, and that he had not had a copy of the depositions; for when the depositions had been once published or known, there could be no further examination on those articles, though there might on new ones.

When the depositions were published, a copy was to be given by the judge to the parties litigant, to make their exceptions if they chose; which, however, was not to be done, unless they had protested, and made mention of such an intention, either before or at the time of the publication. Such an exception was to be proved by witnesses, who were called *testes reprobatorii*, or by instruments which might be reprobated, as they called it, by others; and beyond this there was no further vying and revying (b). When the exception was proved, the judge was then to give sentence according to the credibility of the evidence on both sides. If they seemed to be on a balance, judgment was to be given for the *reus*, unless the side of the *actor* was such as the law treated with peculiar favour; as a case of dower, of a testament, a pupil, widow, orphan,

(a) Corv. Jus Can. 230.

(b) *Ibid.* 231.

the church, the *fiscus*, legitimation, and some others (*a*). If a witness would not readily attend, he might be compelled by the judge, unless he was privileged by some lawful excuse: thus a person was not to be compelled to give testimony against a father-in-law or son-in-law, a step-father or step-son, a cousin-germain or cousin-germain's son, nor against any person standing in the first degree of blood; not a freedman against his master; not a man aged and infirm; a soldier, one absent upon any service, a bishop, a clerk, or other ecclesiastical person. Yet if the truth could not be made out in any other way, the above persons might be compelled to give testimony: but no witness was obliged to attend, unless his expences were tendered him (*b*).

Of instru-
ments:

Thus far of witnesses: the next consideration is the nature of *instruments*. Instruments were divided into public and private. Of the former kind were those made by public persons, as notaries; or under some public seal, as the seal of a bishop, a chapter, a prince; or published by authority of a magistrate; such as were subscribed by the person making it, and by two witnesses, so long as the witnesses were alive; such as were taken out of public archives. Private instruments were those made by private persons without witnesses, as accounts, private remarks, letters, cautions, and the like (*c*). These of themselves were not proofs, except against the person penning them, and not denying them, or the person accepting them; unless, indeed, they were confirmed by the subscription of witnesses, or the contracting parties, or by length of time, or some judicial recognition. Respecting public instruments, there was this difference: such as were made before a judge amounted to full proof, and no proof to the contrary would be admitted; such as were made by a notary also, if attended with all the due solemn-

(*a*) Corv. Jus Can. 232. Launc. Inst. Jur. Can. lib. 3. tit. 14.

(*b*) Corv. Jus Can. 232, 233.

(*c*) Ibid. 234.

nities, amounted to full proof; nevertheless, a proof to the contrary would in this case be admitted. The due solemnities were not the subscription and subsigning of the contracting parties, and of witnesses, but the name and seal of the notary, with the year, place, and so on (a). Instruments, like witnesses, were to be produced after the contestation of suit, and before the judge in the cause. If the *actor* was deficient in his proofs, it was sometimes the practice to allow him to supply that deficiency by his oath.

When the *intentio* of the *actor* was proved in one or other of these ways, the *reus* would be condemned, unless he could defend himself by some exception. Ex-^{Of exceptions.}ceptions were divided into dilatory and peremptory: the former were either such as were *declinatoriæ judicii*, or *dilatoriæ solutionis*. Declinatory pleas either went to the person of one of the parties, or the proctor, or the form of the action. Those that were *dilatoriæ solutionis* were only to defer the claim, which was admitted to be due, but not demandable till a future day. Peremptory exceptions intirely did away the action; and they were divided into those that were *peremptoriæ litis finitæ*, and those *simpliciter peremptoriæ*: the former of these impeded the very commencement of the suit, and might be pleaded *ipso judicii limine*: the latter did not impede the commencement of the suit, but might be pleaded after the contestation of suit in any stage before sentence. Dilatory exceptions that were *declinatoriæ judicii*, were to be pleaded at the commencement of the suit; and, if omitted, could not be pleaded after: those that were *dilatoriæ solutionis*, might be pleaded after the libel, before contestation, within the term assigned by the judge; and yet a dilatory plea might come after the contestation, in some particular cases; as where the matter was new; or where, though it arose

(a) Corv. Jus Can. 235.

before, it did not come to the knowledge of the person pleading it till after the contestation; if the judge had reserved to the party such a ground of exception; if it was excommunication. The judge had a discretion in appointing the time for propounding an exception. A person might have many exceptions, and those contrary ones; and if the judge refused to admit them, the party might appeal.

Next to the exception came the replication; and there the parties stopped, at least with respect to producing witnesses; for to avoid the protracting of suits, it was a rule, *illos tertio refutare non licet*. A replication might be put in at any stage of the suit. As the *reus* was not called upon to prove his exception till the *actor* had proved his *intentio*, so he need not prove his replication till the other had proved his exception. The time for replying was in the discretion of the judge (a).

After the pleading and proofs, the judge was to pronounce sentence *secundum allegata et probata*. In order to this, the parties litigant were to be cited either by three common edicts, or one peremptory, containing the space of three edicts. A sentence, if passed legally, and no appeal made from it in ten days, was considered as *res judicata* (b). Upon this execution followed. There was some difference in the suing of execution in a real and a personal action. In the former, it was to be made immediately upon the expiration of the ten days allowed for an appeal; in a personal one, not till the end of four months. The only execution allowed by this law, was by the spiritual arms which the church had assumed; by suspension, deposition, excommunication, or degradation. If such ecclesiastical censures had not their effect, the secular arm was implored; and if the secular judge refused his aid, the church pursued him with excommunication (c).

(a) Corv. Jus Can. 249 to 256. Launc. Inst. Jur. Canon. lib. 3. tit. 8.

(b) Corv. Jus Can. 263, 264.

(c) Ibid. 265, 266.

Having led the reader through the whole course of proceeding in ordinary cases, it follows that we should consider the nature of an appeal from a sentence, and the execution thereof. An appeal might be either before or after definitive sentence, and was Appeals. always from an inferior to a superior judge. An appeal before a definitive sentence was from an interlocutory one, or any injury felt by the party; as if he was cited to an unsafe place, or at a shorter day than was customary (*a*). For it was a rule in the canon law, that an appeal might be made from every *gravamen* by which a litigant felt himself injured; so that an appeal was considered as a species of defence for the protection of innocence in all cases. An appeal after definitive sentence might be either from the sentence, or the execution of it, if it was unlawfully grievous. An appeal, however, did not lie for a person who was sentenced for a real contumacy, or for a manifest crime; or for one who had confessed and was convicted upon such confession; nor for one who had bound himself by oath (as was not uncommon) to bring no appeal (*b*).

An appeal was to be made *gradatim*, from an inferior to a superior judge: thus from the ordinary of the bishop to the bishop himself; from the official-general of the bishop, and from the bishop, to the archbishop. But an appeal might be made to the pope, or his legate, *uno saltu*, without going through the intermediate gradations. Yet an appeal to the pope did not remove the cause to the court of Rome, but it was to be determined by delegation in the place where it arose; unless in some particular cases, where the pope was satisfied that a delegation could not be made without a failure of justice. From the pope there was no appeal (*c*). An appeal lay both in a civil and criminal cause, unless in some particular cases where it was prohibited. Thus no appeal could be had so as to prevent the opening of a testament, and to restrain the heir from

(a) *Corv. Jus Can.* 267.(b) *Ibid.* 268.(c) *Corv. Jus Can.* 269.*Launc. Inst. Jur. Can.* lib. 3, tit. 17.

coming to his right; nor from an execution, unless, as was before said, it was unlawful and grievous (a); nor from the correction of regular discipline, unless that was made also unlawful and grievous; nor from a sentence of interdict, and some others.

An appeal might be made *instante*, *viva voce*, by the word *appello*, before the judge left the bench, or within ten days after. If it was from an interlocutory sentence, or any other *gravamen*, some reasonable cause of appeal was to be alledged (b), and also that his exception was not admitted; if from a definitive sentence, neither of them was necessary; but the party appealing might alledge before the appellate jurisdiction such *gravamina* as he pleased, founded on matter not entered upon before the judge below; and he might produce fresh witnesses, fresh instruments, and make proof of such things as were not before proved: whereas the appellant, in the former case, was confined to the cause of appeal expressed, which was to be determined intirely on a view of the proceedings in the court below.

The cause was dismissed from the inferior to the appellate jurisdiction by *litteræ dimissorie*, called likewise by the canonists *apostoli*. These were to be sued for by the appellant, at least within thirty days from the passing of the sentence (c); and they were to be made by the judge below, and addressed to the judge before whom the appeal was depending. If they were not obtained within that time, or within a shorter, if so appointed by the judge, the appeal was considered as deserted. If the judge refused the *apostoli*, an appeal would lie from such refusal; and if he did not appeal from the refusal, such acquiescence would be construed as a desertion of the original appeal, and the sentence would stand in force.

When the *apostoli* were granted, the appeal was to be notified to the adverse party, in order that he might appear

(a) Corv Jus Can. 270.

(b) Ibid. 271.

(c) Ibid. 272.

before the new tribunal, and was to be presented within a certain term, to the judge *ad quem*, otherwise the sentence would stand in force. The term for presenting was in some cases fixed by law, and in some was prescribed by the judge, according to the circumstances of the cause and the parties; the judge could not prolong a legal term, though he might shorten it (a). After the presentation was made, if the judge *ad quem* received the appeal, the appellant was to refer to the judge *a quo* the presentation, together with *compulsoriales* and inhibitions, if he required them. The *compulsoriales* were letters sent by the judge *ad quem* to the judge *a quo*, requiring him to transmit to him, within a certain time, the proceedings in the cause, that the truth might be inquired into; which if he neglected, he might be compelled to do by penal mandates issued from the judge *ad quem*. An inhibition was a letter issued from the judge *ad quem* to the judge *a quo*, commanding him not to do any thing in the cause while the appeal depended; and whatever was done, either by the judge or party, pending the appeal, would be rescinded as null and void, the office and power of the judge being suspended, as far as concerned that cause; notwithstanding which, he might yet interfere in some particular cases. Thus, if the thing in question was in danger of being wasted by the appellant, the judge might cause it to be sequestered (b); and other things might be done by the judge, if they did not prejudice the appeal. If the appellant deserted his appeal, or was adjudged to have appealed without good cause, he was condemned in the expences (c).

Another way in which a cause might be submitted to a superior judge, was by *relation*. This was when some difficulty arose, and the judge chose to refer it to the judgment of the pope, or some other superior authority: this was to be before definitive sentence. The grounds of the

(a) Corr. Jus Can. 273.

(b) Ibid. 275.

(c) Ibid. 276, 277.

difficulty were to be set down in articles, and copies given to the parties, that any omission might be supplied by them, and submitted to the pope, or other person to whom the relation was made (a). A *supplication* was a substitute for an appeal in cases where the cause was determined before a judge from whom there lay no appeal, and the party had no resource but to address him by prayer and supplication (b). A *recusatio* might be considered in the light of an appeal: this was, when one of the parties declined the jurisdiction of the court, on suggesting some cause of suspicion against the judge. This should be made before the *litis contestatio*, unless it arose afterwards, and then it might be made at any time, on the party swearing that it had not come to his knowledge before. Any partiality in the judge was a good cause of recusation: this, however, was to be made out within a term appointed by the judge; and if it was not done within a year, the judge might proceed in the suit (c).

Thus far of ordinary proceedings, as directed by the canon law. The extraordinary, or summary jurisdiction, according to the same law, was, as they expressed it, *non in figura judicii, sed ex officio judicis*, by inquisition, or denunciation, or some other course *de plano*, and, upon general grounds of equity. In such case there was no tender of a solemn libel, nor was any contestation of suit necessary; the judge might proceed in times of vacation and holiday; he might refuse to admit any delay, exception, dilatory and vain appeal; he might restrain the superfluous number of witnesses; give any term he chose for the several stages of the proceeding; and might pronounce sentence even before a conclusion was duly made. Such was the proceeding that was followed in causes of election, postulation, provision, dignities, offices, probends, tythes, matrimony, usury, and others (d).

(a) Corv. Jus Can. 279.

(b) Ibid. 280.

(c) Ibid. 277, 278, 279.

(d) Ibid. 286.

Criminal proceedings differed widely from the proceeding in civil suits. The prosecution of offenders in the canon law might be in three ways: by *accusation*, by *inquisition*, or by *denunciation*. We shall first consider the nature of an accusation.

Of proceedings in criminal suits.

An accusation might be brought by all persons that were not under the following disabilities: *Accusation.* an enemy could not accuse an enemy, nor could a person guilty of any crime. It was laid down by the canon law, that a layman could not prosecute a clerk by accusation, unless for an injury done to himself, or any one belonging to him; nor a clerk a layman, without an express protestation that it was not for thirst of blood, or punishment. Persons of low condition could not accuse clerks, unless they had before been in intimacy with them (*a*). Women and infants were equally debarred, unless they prosecuted for any injury done to themselves (*b*). In general such persons were excluded from bringing an accusation as were excluded by the civil law. However, these disqualifications were dispensed with in the more atrocious crimes; for in læse majesty, in heresy, and simony, all the foregoing persons would be admitted to accuse (*c*). The civil law was likewise followed in prescribing the persons who were not to be liable to an accusation; in addition to which the canonists held, that a prince might be accused of heresy, perjury, and sacrilege; with which crimes the canon law did not scruple to declare the pope himself might be charged.

An accusation ought regularly to be brought in the place where the crime was committed, unless the pope should permit it to be brought elsewhere, or the crime could be examined better in another place, or it was an accusation against a bishop, or the *reus* was apprehended in some other place. No one was admitted to bring an

(a) Corv. Jus Can. 346. (b) Laupe. Inst. Jur. lib. 4. tit. 1.

(c) Corv. Jus Can. 346.

accusation, till he had made what they called an *inscription*, or engagement, to undergo the *lex talionis*, by suffering the punishment annexed to the offence, if he failed in making out his charge. A person who made a denunciation by reason of a public office which he filled, was not bound to make this *inscription*; nor was one who accused for any inferior crime, or for apostacy (*a*).

When the accusation was instituted, the cause proceeded by contestation of suit, exceptions, and so on, as in civil suits; unless in inferior offences, and those of lèse majesty and heresy, which were judged of *de plano*, and notorious crimes, where no other proof was wanted, and there was no need of any judicial formality to be observed. Notorious offences were such as were committed before the people, or any great assembly of persons (*b*). The accuser and accused ought to be present at hearing the accusation, unless in some particular cases; as where the offence was only *de injuriâ*, and either of the parties was of some illustrious rank, and the proceeding, though in form a criminal one, was for a civil redress.

Inquisition. The mode of prosecution by *inquisition* was when a judge, without any accuser standing forward, inquired *ex officio*, whether any and what person had committed an offence: it was accordingly either general or special. The former was an inquiry made by a bishop, or other superintending magistrate, whether any offenders were within his diocese or district: the latter was an inquiry by them, whether a certain crime was committed by a certain person (*c*). *Inquisition* might be made by the pope through his legates or delegates; by bishops in their dioceses; metropolitans in their provinces; in short, by all persons having criminal jurisdiction.

(*a*) Corv. Jus Can. 348.

(*b*) Lyndwode gives us two verses from a canonist, in which the qualities of notoriety are thus expressed:

Qua vel nemo negat, populo vel teste probantur,

Fel se subiciunt oculis, notoria dicas.

Lynd. 323. n.

(*c*) Corv. Jus Can. 350.

Inquisition was to be made only of the more enormous crimes, as simony, adultery, fornication, perjury, incest; nor was it to be made of crimes that were concealed and not known, but only of such concerning which there had been an *infamia*, *diffamatio*, or evil report, founded upon public persuasion of the offence having been committed, and not upon the malevolent suggestions of those who took malignant pains to spread the rumour. In the case of a prelate, besides the *diffamatio* or *infamia*, there ought to be some scandal or danger, otherwise no inquisition was to be made. If a *reus* was silent, (which silence was construed into a confession) he might be convicted without any preceding *infamia*, or at least any inquiry into such existing *infamia* (a). All this relates to an inquisition against a particular person; for a judge might make a general inquiry without any *infamia* preceding, and thence might come to a special inquisition against a particular person. In a special inquisition, the articles of inquiry were to be exhibited to the *reus*, and also the names and declarations of the witnesses. Inquisitions were to be made by means of proper persons, and of good credit, and not through the enemies of the party, and persons guilty of perjury. To what the inquisition was to be directed, depended on the pleasure of the judge. If the party was convicted of the crime by inquisition, he did not undergo the ordinary punishment, but such a one as the judge thought proper: if the crime was not proved, then he was to submit to the canonical purgation, of which more will be said hereafter.

The third mode of prosecution, called *denun-* Denunciation, *ciation*, was when information was given of a concealed crime to the judge, without any of the formality of an accusation. The canonists divided denunciation

(a) Corv. Jus Can. 331.

into *evangelical*, *canonical*, and *judicial* (a). The first was with no other view than that of amendment of the offender; as when a wife gave information to a priest of the adultery of her husband. The second was to prevent any thing unlawful from taking place; as giving information that certain persons who were going to contract matrimony, were within the prohibited degrees. Judicial denunciation was either public or private: the former was done by a public officer, and always was preceded by an inquisition made by the bishop or other judge; the latter was by a private person who was concerned in interest to make it. By the canon law, all persons who had some interest in the subject might make *denunciation*, and indeed other persons who were actuated by a zeal for the public good (b); not those who were infamous, conspirators, or enemies. A denunciation used to be made without inscription; but though the informer was not bound in that manner to prove the crime, yet he was always required to take an oath of calumny, and name the witnesses who were acquainted with the offence.

It was required (c), before a denunciation against a clerk, that there should be a charitable admonition; but not in the case of laymen. The great object of denunciation was, that an offence being thus known to the judge, he should have the power of making further inquiry concerning the truth of it (d).

If a *reus*, who was suspected of a crime, could not be convicted on proof, he was not therefore to be absolved, but was required to make out his innocence by canonical purgation. This was so called, because imposed by the canons, and to distinguish it from the vulgar purgation, which consisted in the ordeal, and had been reprobated, long since, by the clerical law. Canonical

(a) *Corv. Jus Can.* 352.

(b) By a provincial constitution in Lyndwode, certain persons were appointed in every diocese to be denunciators.

(c) *Corv. Jus Can.* 353.

(d) *Ibid.* 354.

purgation was, when a person made out his innocence by his own oath, swearing that he was not guilty, and the oaths of compurgators, swearing that they believed him to speak truth. This was to be directed by the judge who head the cause in which he was defamed, and by no other. The judge directed purgation, either at the instance of the party who was to be purged, or to satisfy himself respecting the suspicions under which the *reus* laboured. The judge might, if he pleased, though he was not bound to, enjoin purgation, even where the *infamia* did not arise from very probable conjectures.

Purgation was not to be enjoined but where the *reus* was a credible person, who, though under suspicions, would not be thought very ready to perjure himself; and it was only to be where the party was not convicted, either by legal proof, or his own confession; where the crime was not notorious, but yet he was diffamed among good men upon probable suspicions. The judge was to chuse the compurgators from persons of honest character, neighbours of the *reus*, and well acquainted with his life and conversation. They were to be sometimes twelve, sometimes seven, sometimes more and sometimes less, according to his discretion, considering the circumstances, the nature of the offence, and the quality of the *reus* and compurgators. The purgation was to be made where the diffamation was: thus if he was diffamed by the people, it was to be before the people; if among clerks, before clerks; and the like. If he succeeded in his purgation, he was liberated from the charge; if he failed, he was punished the same as if he was convicted, or had confessed (a).

It appears unnecessary in this place to bring back to the reader's recollection the conduct of criminal prosecutions in our own law, as mentioned in the earlier parts of this

(a) *Corv. Jus Can.* 378, 379, 380.

History. The similarity between those and these we have just been relating, is too strong to need being pointed out. We now see, that not only purgation is a piece of law intirely canonical, but that the proceeding *per famam patriæ*, from whence was derived the presentment of jurors, may be found elsewhere than in our municipal customs; and that, according to the accounts of our earliest writers, it was first practised amongst us upon ideas and principles purely canonical (a).

The punishments which the ecclesiastical court could inflict, were all of a spiritual kind; they consisted either in penance, excommunication, interdict, suspension, removal, or degradation. Some of these censures require a little further consideration.

Excommunication. Excommunication was divided into what they called the *greater* and the *less*. The latter only removed the person from a participation of the sacraments, and is what was more commonly meant by excommunication: the other was called *anathema*, and not only removed the party from the sacraments, but from the church, and all communion with the faithful. Excommunication sometimes followed *ipso facto*, upon the commission of an offence: this was called *canonical*, to distinguish it from that which did not depend upon any established canon, but upon the passing of sentence by a judge (b).

The following offenders were *ipso facto* punished with the greater excommunication; all diviners and *sortilegi*; heretics, their receivers and comforters; simoniacs; violators and plunderers of churches; those who spoiled clerks going to Rome; the plunderers of the property of a bishop

(a) It may be here remarked, that supposing this proceeding to have been formed with an eye to the canon law, our conjecture about the offender's innocence being determined by the same persons who suggested the *infamia*, or at most by purgation, without resorting to another jury, is justified by the account given above of *inquisitions*.

(b) Corv. Jus Can. 359.

which ought to go to his successor; those who gave aid, favour, or counsel to excommunicated persons; those who laid violent hands on clerks or religious persons, or commanded any so to do (a). The following offenders were *ipso facto* punished with the less excommunication: all persons committing any mortal sin, as sacrilegious persons; those who received a church from lay hands; notorious offenders; those who talked with, saluted, or sat at the same table with, or gave any thing in charity to persons excommunicated by the greater excommunication, unless they were familiars or domestics (b).

The greater excommunication could be inflicted only by one having criminal jurisdiction; the less might be imposed by any clerk having the cure of souls. Excommunication was a censure that could pass only against the living, except in the case of heresy, which might be prosecuted after the death of the party. It could not from the nature of it be passed against pagans, who constituted no part of the church (c).

A sentence of excommunication was to be preceded by three monitions at the due intervals, or one peremptory, containing the legal space of time, with a proper regard to the quality of the person, and the nature of the business. The judicial course also ought to be observed, though the excommunication would hold without it, but not without the monition; and the judge who passed sentence of excommunication without it, would be prohibited for a month *ab ingressu ecclesie*; and if proper, be subject to other penalties (d). A sentence of excommunication might pass absolutely or conditionally; as, "Unless you satisfy Sempronius within twenty days, I excommunicate you." The sentence was to be put into writing, containing the cause thereof, and the name of the party (e). An excom-

(a) Corv. Jus Can. 360.

(b) Ibid. 361.

(c) Ibid. 363.

(d) Ibid. 364.

(e) Ibid.

munication might be taken off in several ways. It might be revoked by the judge who passed the sentence. Upon appeal, the judge *ad quem* might absolve the party, or send him to the judge *a quo* to absolve him. Absolution belonged to the same person who passed the sentence, unless in some particular cases that were referred to the pope or a bishop (a). Absolution in some cases used not to be given, till security was entered into by the party for making satisfaction (b).

Interdict. An *interdict* was an ecclesiastical censure, by which a certain place or certain persons were interdicted from the participation of divine rites, sepulture, and the sacraments, till the commands of the church were obeyed. This, like excommunication, was either *ipso facto* by the precise direction of the law, or by sentence of the judge. Of the former kind was such as was denounced against a community or city which did not expel usurers, or which permitted reprisals against ecclesiastical persons, or did not make them good within a month; a lord who would not admit a legate or apostolic messenger within his territory; a church polluted (c) with human blood, or consecrated simoniacally.

A sentence of interdict might be passed by all who could pass sentence of excommunication; an ordinary, delegate, bishop, provincial synod. An interdict, if for contumacy, should be preceded by monition; but this was not necessary, if for an offence (d). An interdict, if issued against a people by the term *populus*, was construed not to include the clergy. During an interdict, in early times, none of the ecclesiastical offices could be celebrated, nor any of the sacraments, except the baptism of infants, and the penitence of dying persons (e). This was in subsequent times relaxed; and baptism and confirmation were allowed to all; penitence and the eucharist to the dying;

(a) Corv. Jus. Can. 367, 368.

(d) Ibid. 372.

(b) Ibid. 369.

(e) Ibid. 373.

(c) Ibid. 371.

but not extreme unction to the laity, though it was to the clergy: at length they allowed mass and other divine ceremonies to be performed once a-week, in some few churches and monasteries, with a low voice, and the doors shut, without ringing of bells; and afterwards they allowed it in all churches, every day, though with the observance of the other restrictions; which, however, need not be adhered to on certain great festivals of the year. Persons who did not obey such interdict would be deposed, and rendered incapable of taking a benefice (a). An interdict might be confined to certain persons, or to a certain place; it might be removed by absolution, as excommunication was.

Suspension was an ecclesiastical censure, by which a spiritual person was interdicted from the exercise of his office, or order, or both; intirely, or in part, for a time, or *in perpetuum*. This, like the two former, was either *ipso facto*, and canonical, or imposed by the sentence of a judge (b). *Remotion*, or *deposition* (which is the last ecclesiastical censure we have to mention), like the former, only related to ecclesiastical persons, who might thus be deposed, either from their dignity, order, or degree: deposition was only by sentence, and the sentence of a bishop (c). *Degradation*, sometimes called *solemn deposition*, was the solemn detraction of the higher orders. The solemnity was this: If an abbot was to be degraded, it was to be in the presence of abbots; if a presbyter, of six bishops; and also in the presence of the secular judge, to whom he was to be delivered when degraded. In the presence of these parties, the bishop was to shave the head of the *reus*; then he was to scrape with glass or iron those parts of the head and hands which were anointed at the time of his ordination; after this, he was to take off, in an order intirely reversed from that in which it was put on, his clerical habit.

(a) Corr. Jus Can. 374.

(b) Ibid. 375.

(c) Ibid. 376.

When this was performed, the party became, to all purposes, a layman; and being thus deprived of all his clerical privilege, was delivered over to the secular court, to be punished by the secular laws. This punishment of degradation was inflicted only in three cases; in case of a heretic, of a falsifier of the pope's letters, and of one who had practised against, or any ways calumniated, his bishop (a).

(a) *Corv. Jus Can.* 377, 378.

CHAP. XXV.

HENRY VI. EDWARD IV.

Of Ecclesiastical Jurisdiction—Of Matrimony—Espousals—Nuptiæ—Of Cognation—Consanguinity—Affinity—Of Divorce—Jactitation of Marriage—Of Wills and Testaments—Executors—Of the Forms of Wills, &c.—Of Probate—Of Intestacy—Of Pious Uses—The Rationabilis Pars—Tithes—Sylva Cædua—Composition for Tithes—Spoliation—Suits de Læsione Fidei—Defamation—Prohibitions—Provincial Constitutions—King and Government—The Statutes—Fortescue—Littleton—Lyndwode—Printing of Law-Books—Miscellaneous Facts.

SUCH was the juridical system which the Roman canonists had been labouring so many years, with such perseverance and energy, to establish in our ecclesiastical courts: and notwithstanding they were, as we have seen, in some instances, disappointed of their object, they succeeded in gaining prescription for more than seven parts in ten of the pontifical law, which, under controul of the temporal judges, became the prevailing rule of decision in the ecclesiastical courts. It is now our business to enquire more particularly what was the extent of this jurisdiction, what objects it embraced, and in what manner it treated them. This has been slightly touched in the reign of Henry III. (a); but so much time had elapsed, and such

(a) Vid. ant. vol. I. 454, 455, &c.; and vol. II. 79.

controversy had since happened upon questions of judicature between the clerical and temporal courts, that the subject is still open to further illustration; and it will be curious to see how the law of antient times is either corroborated, new modelled, or altered by later opinions.

Of ecclesiastical jurisdiction. Of the objects which the canonists claimed as belonging to their jurisdiction, our temporal courts had long appropriated to themselves to decide exclusively upon rights of patronage, and upon all crimes affecting life and limb. *Freehold* and *chattels* were two other descriptions that marked many articles of judicature as subject solely to the decision of the common-law courts. On the other hand, the judges seem to have given themselves no concern as to the mode in which the ecclesiastical court proceeded with causes that were left to their determination. The spiritual tribunal was permitted, undisturbed, to enjoy the privilege assumed by all courts, of forming its own course of proceeding; and it accordingly adopted, without any material variation, the practice of the canon law mentioned in the foregoing chapter. Without, therefore, entering any further into the nature of judicial proceedings, we shall briefly recapitulate the several objects upon which they might be employed; most of which have been frequently mentioned in the former parts of our History, either from Bracton, or the famous constitution of Boniface, in the reign of Henry III; the statutes of *circumspectè agutis*, or *articuli cleri*; or on some other of the many occasions when the jurisdictions of the temporal and clerical court came into competition (a).

The two grand descriptions of causes which seemed more indisputably than any others within the cognisance of this tribunal, were *matrimonial* and *testamentary*, and their incidents. Under testamentary were included last wills, codicils, legacies, administration and sequestration,

(a) Vid. ant. vol. I. 454; and vol. II. 79. 215. 291.

commonly called letters *ad colligendum*. Under matrimonial were included, divorce; jactitation of marriage; questions of legitimation and bastardy; suits for restitution of a man's wife taken away; suits to compel a man to receive his wife again; and suits for goods promised with a woman in marriage. These were the principal and more important objects of jurisdiction; the remainder, which may with our canonists be considered as *reliqua jura ecclesiastica*, were classed in the following way:

First, some duty arising upon the exercise of voluntary jurisdiction, and by denial made litigious; such as *real compositions*, when attempted by some persons to be annulled; procurations, pensions, indemnities, fees for probates, and the like: or secondly, such demands as became due only upon exercise of litigious jurisdiction; as fees of court, fees to advocates, proctors, apparitors, and the like: or thirdly, such as were due to a minister in the church who had no title; as a salary to a curate or a clerk: or fourthly, to a minister who had a title; and then it was either something incident to him, as to name a parish-clerk, or concerning the whole title and interest of his benefice; for though the right of patronage was cognisable only in the temporal court, yet the avoidance or spoliation belonged to the court christian. Next follow the dues that concern a minister's maintenance; as tithes, oblations, obventions, pensions, mortuaries, church-yards, or places of burial: and lastly, such things as are due to a whole parish; as to have a chaplain found, or divine service performed, or sacraments administered amongst them, or any thing due to their church; or for a parishioner to be contributory with the rest to reparation of the church, for seats, bells, books, utensils, and other ornaments or necessities for the church. Thus far of those things that were objects of jurisdiction in consideration of their being *jura ecclesiastica*.

The crimes and offences punishable by the court christian, were divided into such as were contrary either to piety, justice, or sobriety. Of the first class were blasphemy, swearing, idolatry, heresy, error in faith, schism, apostacy, not frequenting public prayer, neglect of the sacraments, perjury in an ecclesiastical court or matter, disturbance of divine service, violating and profaning the sabbath. Of the second were simony, usury, diffamation, subornation of perjury in a court ecclesiastical, violence to a minister, sacrilege, dilapidations, not building of a church as enjoined by a testator, not fencing a church-yard, not repairing a church or chancel, or not keeping it in good repair; a church-warden refusing to give an account of the church stock and goods; the violating of a sequestration made for tithes not paid; hindering to gather or carry tithes; money promised for redeeming corporal penance; contempt of the ecclesiastical jurisdiction; the violation of churches and church-yards. Of the last class were all incontinence not made capital by the common law, whether it was incest, adultery, *stuprum* or simple fornication, polygamy, the solicitation of a woman's chastity, drunkenness, filthy speech, or the like irregularities (a).

The objects of clerical jurisdiction, when thus enumerated and placed in array, make a very formidable appearance: and when we reflect, that many spiritual offences were the consequences of habit and constitution; that the censures inflicted on such offenders might be commuted for money, payable to the judge himself; and that there was such a judge in every diocese to enforce the execution of the law; it must be confessed, that the ecclesiastical maintained against the temporal power a divided empire,

(a) Vid. An Apologie of certaine Proceedings in Courts Ecclesiasticall, printed in the reign of Queen Elizabeth, Part I. page 18.

which if not so extensive, was more vigilant, more oppressive, and more odious to persons of both sexes, and of every rank and age in the kingdom; and was capable of producing great good or great evil (a).

(a) Our old English Bard has given us a very spirited comment upon the practice of the spiritual court, which, if it is not overcharged, deserves all the credit of a cotemporary exposition of the conduct and manners of its retainers. In the *Canterbury Tales*, Chaucer introduces a Friar, and a Sumpnour, or Apparitor, who used to serve the *summons* and citations of the bishop's court. The latter had shewn a violent disposition to quarrel with the former, which the Friar attributes to his fraternity being exempt from the jurisdiction of the bishop, and so not liable to be pillaged by the Sumpnour's extortion. This perhaps might be the true cause, and it accordingly drew more ill language upon the poor Friar; who, when it came to his turn, revenged himself by telling a malicious story of a Sumpnour. He begins with an account which seems to describe the jurisdiction of the spiritual court very fully.

Whilom ther was dwelling in my contree
An archedeken, a man of high degree,
That boldely did execution
In punishing of fornication,
Of witchecraft, and eke of bauderie,
Of defamation, and avouterie;
Of chirche-reves, and of testaments,
Of contracts, and of lack of sacraments;
Of usure, and of simonie also;
But certes lechours did he grettest wo;
They shulden singen, if that they were hent,
And smale titheres weren foule yshent:
If any persone wold upon hem plaine,
Ther might astert hem no pecunial peine.
For smale tithes, and smale offering,
He made the peple pitously to sing;
For er the bishop hent hem with his crook,
They weren in the archedeken's book;
Then had he, thurgh his jurisdiction,
Power to don on hem correction.

Of all these points of judicature, none was so fruitful to the court as that of incontinence; this was a weed to be found in most soils, and the Sumpnour was always hunting for it. The Friar tells us,

A Sumpnour is a renner up and down
With mandements for fornicacioun,
And is ybete at every tounes ende.

The Friar makes the supposed Sumpnour's diligence to be mostly engaged on this part of his employment. After the above account of the archdeacon and his court, he goes on thus:

He had a Sumpnour redy to his hond,
A slier boy was now in Englelond;

In order to obtain a more clear idea of the clerical judiciary, we shall now take a nearer view of the different

For subtilly he had his espiaille,
That taught him well wher it might ought availe;
He coude spare of lechours on or two,
To techen him to foure and twenty mo.

This false thief, this Sumpnour (quod the Frere)
Had alway baundes redy to his hond,
As any hauke to lure in Englelond,
That told him all the secree that they knewe,
For bir acquaintance was not come of newe;
They weren his approvers prively.
He tooke himself a gret profit therby,
His maister knew not alway what he wan.
Withouten mandement, a Jewed man;
He coude sompne, up peine of Christe's curse,
And they were inly glad to fill his purse,
And maken him gret festes at the nale.
And right as Judas hadde purses smale,
And was a thief, right such a thief was he,
His maister hadde but half his duetee.
He was (if I shall yeven him his laud)
A thief, and eke a Sumpnour, and a baud.

He had eke wenches at his retenuue,
That whether that Sire Robert, or Sire Hue,
Or Jakke, or Rauf, or whoso that it were
That lay by hem, they told it in his ere.
Thus was the wench and he of on assent,
And he wold fecche a feined mandement,
And sompne hem to the chapitre bothe two,
And pill the man, and let the wenche go.
Then wold he say, Frend, I shall for thy sake,
Do strike thee out of oure lettres blake;
Thee thar no more as in this cas travaille,
I am thy frend, ther I may thee availe.
Certain he knew of briboures many mo
Than possible is to tell in yeres two:
For in this world n' is dogge for the bowe,
That can an hurt dere from an hole yknowe,
Bet than this Sumpnour knew a slie lechour,
Or an avowtrer, or a paramour;
And for that was the fruit of all his rent,
Therefore on it he set all his intent.

[See the Frere's Tale.]

The game which these spiritual bailiffs were in the practice of playing, by such well-timed activity and connivance, is noticed by Chaucer, in the character he gives of this very Sumpnour, against whom all the laugh was raised by the Friar.

He was a gentil hartot and a kind,
A better felaw shulde a man not find.
He wolde suffre for a quart of wine,
A good felaw to have his concubine

objects of its jurisdiction, beginning with causes matrimonial and testamentary, and then proceeding to titlres, and the others before enumerated.

A twelve month, and excuse him at the full.
 Full prively a finch eke coude he pull.
 And if he found o where a good felawe,
 He wolde techen him to have non awe
 In swiche a cas of the archedeken's curse,
 But if a mannes soule were in his purse;
 For in his purse he shulde ypunished be;
 Purse is the archedeken's helle, said he.
 But well I wot he lied right indede:
 Of cursing ought eche gilty man him drede.
 For curse wol sle right as assoiling saveth,
 And also ware him of a *significavit*.

In dauger hadde he at his owen gise,
 The yonge girls of the dioise;
 A knew hir conseil, and was of hir rede. [See the Prologue.]

To go on with the Friar's Tale, who brings the Sumpnour into conversation with a bailliff.

Brother, quod he, here wonneth an old Rebekke,
 That had almost as lefe to lese hir nekke,
 As for to yeve a peny of hire good.
 I wol have twelve pens though that she be wood,
 Or I wol somone hire to our office;
 And yet, God wot, of hire know I no vice.

He then describes him as knocking at the woman's door, and entering upon the execution of his office, in the following manner:

I have, quod he, of somons here a bill:
 Up peine of cursing, loke that thou be
 To-morwe before the archedeken's knee,
 To answeere to the court of certain things.

May I not axe a libet, Sire Sumpnour,
 And answeere ther by my procuratour,
 To swiche thing as men wold apposen me?
 Yes, quod this Sumpnour, pay anon, let see,
 Twelf pens to me, and I wol thee acquite,
 I shall no profit han thesby but lite:
 My maister hath the profit, and not I;
 Come of, and let me riden hastily;
 Yeve me twelf pens, I may no langer tarie.

The sequel of the Tale is not to our purpose, except that the woman being unable to pay the money, the Sumpnour is represented as pretending to have compounded at the office former irregularities committed by her, and that she had never reimbursed him: to indemnify himself, therefore, for both demands at once, he is made to seize on a piece of her furniture.

Of matrimony. Of all articles of judicial cognisance which the ecclesiastical court claimed exclusively to entertain, that of *matrimony* seems to have been least controverted by the temporal judges. When marriage was admitted by the religion of the country to be a christian sacrament, the jurisdiction of spiritual judges could not well be disputed. We accordingly find no parliamentary interposition on this head, but the ecclesiastical court was left to decide in matrimonial causes upon the pure principles of canonical jurisprudence.

Matrimony was defined by the canonists in this manner: *Viri et mulieris conjunctio, individuum vitæ consuetudinem, cum divini et humani juris communicatione, continens.* This

Espousals. union of man and wife was preceded by *sponsalia*, or espousals, the nature of which must be first considered, before we come to speak of matrimony. Espousals were the promise of a marriage that was to take place, and were divided into espousals *de presenti*, and espousals *de futuro*. Those of the former kind were considered in the same light as matrimony; so that espousals, properly so called, were the latter; which were, when a promise of a future marriage was made by words of a future

This vindictive Tale sets the officers of the spiritual court in a very disgraceful light, and reflects some scandal on the court itself. Making allowance for exaggerations, we may, however, collect from this and other notices, that the officers of the bishop were perhaps as numerous, as well known, and as much regarded as those of the sheriff; that irregularities of conduct, if known, were as constantly corrected, as the depredations of robbers; and that the power and jurisdiction of this tribunal was, therefore, continually before the eyes of the people. Such considerations as these can alone account for the great heat with which questions of judicature were contested on both sides. When the reformation of religion had lowered the pretensions of the clergy, and altered the sentiments of the people respecting ecclesiastical authority, the bishop's court exercised its jurisdiction with great tenderness and scruple, till at length it sunk into neglect, and almost into oblivion. The state of things at present is very much altered. It is rarely that ecclesiastical judicature is now heard of any where but in the courts that are collected together in *Doctors Commons*.

signification; as, "I will take you to wife." Such espousals might be *nuda et simplicia*, or *firmata*, as the canonists called them: the former was where a mere promise was made; the latter was where some earnest or pledge preceded, as a ring given, or an oath taken. Espousals must be contracted by consent, whether expressed in words, or by some sign; as that of a ring, a gift, a kiss, or embrace; by a letter, messenger, or procurator. A ring, to answer this purpose, must always be accompanied with some signs to express both that it was given and received by way of espousals; and any doubt on this point was to be determined by the ecclesiastical judge.

All persons who had completed their seventh year, were held competent to contract espousals; and espousals contracted even before that age, might be ratified by a regular consent. It was no impediment that a person was deaf and dumb, provided he had his intellects, and could express his mind by signs. Espousals might also be contracted by third persons for the party; as by a father for a son, a mother for a daughter, an uncle for a nephew, by tutors and curators for their pupils. But these had no legal effect, unless the party when of age of puberty signified his consent; which in case of a promise by a father might be a tacit consent, but in other cases must be express: if the party was present, and preserved a silence, it was held to be a tacit assent. Espousals were made either *purè*, or with appointment of a day, or *sub conditione*. If the promise contained neither of the latter qualifications, it was said to be made *purè*. A promise on condition made the performance of it depend on some event, and till that took place it had no effect; unless a *carnalis copula* intervened, or the condition was such as the law pronounced to be *turpis*.

Espousals, when once contracted, so bound the parties, that they could not retract, but each had a *jus matrimonii*, so as to be able to institute a suit for the ecclesi-

astical judge by censures to compel the other party to consummate the marriage. Indeed, if a *carnalis copula* succeeded, the marriage was completed without more ceremony; for notwithstanding the maxim, that *non concubitus sed consensus facit matrimonium*, the church presumed that by such act the party meant to perform his promise, rather than commit the sin of fornication. This was a presumption which did not admit any proof to the contrary, and it could be done away only by shewing that the espousals had before been legally dissolved, or were in themselves null and void. If there were more than one espousals, the former were preferred, even though the latter had been sanctioned by an oath; unless indeed a *carnalis copula* had taken place. The effect of espousals was to create such a relationship, that the *consanguinei* of the *sponsus*, or man espoused, could not, upon his death, or the dissolution of the espousals, marry with the *sponsa*, nor *vice versâ*.

Many were the causes which were held by the canonists sufficient to dissolve espousals. They might be dissolved by mutual consent, even though sanctioned by an oath; by absolution of the judge; by other espousals confirmed by a *carnalis copula*; by affinity supervening, though by an illicit *copula*; by entry into religion; by fornication, whether corporal or spiritual, as if either party fell into heresy or idolatry; by lapse of time, as if they had let the day mentioned in the contract pass; or, if no day was fixed, an absence of three years; for if a person was absent such a length of time without sufficient cause, the other party might contract afresh; by failure in performing a condition, if any was annexed; by report of a canonical impediment; by *capitales inimiciæ* happening between the persons espoused; by asperity of manners in either party; by deformity, or any contagious disorder; in all which cases other espousals might be contracted, without the authority of the judge, if the cause was notorious in point

of fact, and likewise plain in point of law; if not notorious, then by the sentence of a judge (a).

Espousals *de presenti*, as was before said, were in effect a contract of marriage celebrated *per verba de presenti*. The definition of *matrimonium* or *nuptiæ* was *Nuptiæ.* given before: upon that definition it is sufficient to remark, that the words *divini humaniq; juris communicationem*, expressed that the parties should be of the same religion. Christians, by the canon law, could not contract matrimony with Pagans, Jews, or Turks, under pain of excommunication. Matrimony was considered in various lights: first, it was public or clandestine: the former was celebrated in the presence of witnesses with all the due solemnities; the latter was without either. Again, matrimony was divided into *legitimum et non ratum*, and *ratum et non legitimum*, and *legitimum et ratum*.

A marriage was said to be *legitimum et non ratum*, if it was celebrated between Jews and Infidels, and it was called *non ratum*, because it might be dissolved by repudiation; whereas marriage among christians was indissoluble, and was therefore called *ratum*; so that a marriage *ratum et non legitimum* was such as was among christians, without the canonical solemnities; that which was *ratum et legitimum* was a marriage among christians, attended with all the due canonical solemnities. This is the marriage which it is our business to consider.

For a marriage to be contracted in a legitimate way, it was necessary to have the consent not only of the parties, but of the parents, if they had any; and if there was any force, or fear, or error, these were circumstances that vitiated a marriage, and rendered it void. The *metus* was such as *in constantem virum vel feminam potest cadere*; and the *error* was to be concerning something necessary to the marriage, as the identity of the person, and not his quality or fortune. There were other impediments to matrimony

(a) Corv. Jus Can. 79 to 84. Lamb. Inst. Jur. Can. lib. 2. tit. 9, 10.

than these three, and these impediments were divided into such as impeded the contract of marriage, and, if completed, dissolved it; and those which impeded, but did not dissolve, the contract. Of the former kind were force, fear, and error, which have just been mentioned; to which the canonists added *cognatio, justitia publicæ honestatis, votum solemne, ordo, crimen, coeundi inpotentia, cultus disparitas*.

Cognition. The impediment of *cognition* was that upon which the canonists had employed great attention; and by various subtleties they had extended it to such unexpected consequences, that the compass within which marriage might be contracted, was by these means greatly narrowed.

They divided *cognition* into *spiritual, carnal, and legal*. Spiritual was such as arose from baptism or confirmation. Thus there was a *compaternitas* between the spiritual father who baptised, the sponsor for the child (*a*), and the father of it; and a *paternitas* between the person baptising and the child baptised, the sponsor and the child. There was in like manner a *fraternitas* between the children of the person baptising, or of the sponsor, and the child baptised; and such cognition in either of these instances was an impediment which would both obstruct marriage, and dissolve it, if contracted. The canonists, however, had guarded against one probable consequence of this cognition; for if the father or mother of the child should happen to be sponsors, this was not held to be a cause of separation, though it was an irregularity that constituted a spiritual offence (*b*).

(a) *Qui puerum suscipit de fonte*; this was done by the *sponsor*, or godfather.

(b) The Council of Trent made an alteration in this point of spiritual cognition; for it was there decreed, that the prohibition of marriage was only to be between the child and its father and mother and the sponsor; and between the person confirming and the confirmed, and its father and mother; and the person holding it at the time of confirmation; without extending to the descendants in either case. Corv. Jus Can, 90, 91.

The *cognatio carnalis* arose either from con- Consanguinity or affinity. Consanguinity, which was sometimes signified by the general appellation of *cognition*, is defined by the canonists to be, *vinculum personarum ab eodem stipite descendentium, vel ascendentium, carnali propagatione in matrimonio, vel extra illud, contractum*. There are three considerations relating to this point, which are the *stipes*, *linea*, and *gradus*. The *stipes* was the stock from which the persons, whose relationship was in question, descended; and this was never computed as a degree. *Linea* was defined to be *collectio personarum ab eodem stipite descendentium, diversas continens gradus, et numeros distinguens*. It was either the *right line superior*, containing the ascendants; or *inferior*, containing the descendants; or *transverse*, which was between the brothers and other *cognati*.

The transverse line was either *equal*, which was when the *cognati* were equally distant from the *stipes*; or *unequal*, which was when they were not. Thus brothers were in an equal line, because both were distant in the same degree from the father: the brother and brother's son were in an unequal line, because the brother was distant from the father in the first degree, but the brother's son in the second. A *gradus*, or degree, is defined, *habitus distantium personarum quâ propinquitatis distantia inter personas duas vel diversas discernitur*. The canon law, as it considered the degrees with a view to marriage, which subsisted by the consent of two parties, for that reason always joined two persons in reckoning them. This was done differently in the right line, and in the transverse line; for in the right line, whether superior or inferior, it was a rule, *quot generationes numerantur, tot numerantur gradus, dempto stipite*: thus every person, whether ascending or descending, added a degree. In the transverse line, if equal, the rule was, *quoto gradu unusquisq; eorum distat à stipite, eodem distant inter se*. Thus, *patrueles* and *consobrini* are distant in the second degree from the common stock,

and therefore, by the canon law, were deemed in the same degree from each other; so that two degrees, as reckoned in the civil law, constitute only one in the canon law. In the *transverse unequal line* the rule was, *quoto gradu remotior distat à stipite, eodem distant inter se*: thus the brother's son was distant in the second degree from the uncle, because he was distant from the grandfather, the common stock, in the second degree.

Thus stood the law of consanguinity, according to the computation of the canonists; and the manner in which they applied it to the subject of marriage was this. In the right line, whether ascending or descending, all marriage was prohibited *in infinitum*, and such as were contracted would be dissolved. In the transverse line, marriage was formerly prohibited as far as the seventh degree, and lately to the fourth degree only inclusive^(a): however, they held that such prohibited marriages contracted between infidels, who were afterwards converted, should not be dissolved.

Affinity. Thus much of consanguinity: affinity, the other branch of cognation, was defined to be, *personarum necessitudo, ex coitu proveniens*, whether lawful or unlawful. Affinity, however, did not extend to the *affines* of the married person, nor to the *cognati* of the man and woman between themselves. The degrees of affinity were calculated by the same rule as those of consanguinity; for as man and wife were one flesh, so in whatsoever degree of consanguinity *Titius* or *Titia* stand to me, in the same degree of affinity would stand the husband of the one or the wife of the other. Affinity was of three kinds. The first kind of affinity was contracted by one person, the second by two, and the third by three. For example, my brother is

(a) There seems to have been some ambiguity as to the degrees prohibited in England. By a constitution of Archbishop Laufranc, no marriage was to be allowed within the seventh degree; and yet we find that stat. 32 Hen. VIII. c. 38. speaks of the prohibition as confined to the fourth, or fifth degree.

my *consanguineus*, his wife Mævia is related to me in the first kind of affinity; if my brother died, and Mævia married Titius, he would be related to me in the second kind; and if Mævia died, and Titius married another wife, she would be related in the third kind of affinity. The wives or husbands of two who were related by consanguinity, were related to each other by an affinity of the second kind. In short, the husband or wife of one related to me by consanguinity, is related to me by an affinity of the first kind; the husband or wife of such relation in the first kind of affinity, is related to me in the second; and the husband or wife of a person related to me in the second kind, is related to me in the third kind of affinity.

The manner in which this law of affinity was applied to marriage, was this: in like manner as marriage between *consanguinei*, in the ascending or descending line, was prohibited in *infinitum*; it was equally so among those related by affinity, because they were considered in *locus parentum et liberorum*; so that no marriage could take place between me and the *consanguinei* of my wife in the right line. The same prohibition extended to those in the transverse line, as far as the seventh degree in the first kind of affinity; to the fourth degree, in the second kind; and to the second degree, in the third kind. It must be remarked, that the affinity to impede marriage, must be such as subsisted before the marriage, and not such as might afterwards supervene. Such subsequent affinity would neither dissolve a marriage, nor espousals *de presenti*, though it would espousals *de futuro*.

All these impediments, whether from consanguinity or affinity, might be dispensed with by the pope, upon shewing some true and lawful cause for such dispensation. But even on this prerogative of the sovereign pontiff the canonists had imposed some restrictions; for it was held, that he could grant no dispensation to make a marriage lawful, if the impediment was in the right line; but only in

the collateral, and in that too not nearer than the second degree. For, say the canonists, the pope in the plenitude of his power could dispense with the law only where he violated neither the articles of faith, nor the general state of the church.

The last sort of cognation; called *cognatio legalis*, is defined to be, *personarum proximitas ex adoptione vel arrogatione solenni ritu factâ proveniens*. This both impeded and dissolved matrimony between ascendants or descendants, not only during the adoption, but even if it was at end; in the transverse line, only while the adoption subsisted. But the law of adoption never having prevailed in this country, no impediment could arise to marriage on this consideration. Thus far of cognation in all its parts.

The next impediment was what the canonists termed *justitia publicæ honestatis*; and this they defined, *propinquitâ ex sponsalibus proveniens, robur ex institutione ecclesiæ trahens propter ejusdem ecclesiæ honestatem*. This both impeded and dissolved marriage; and it extended to the fourth degree. The *votum castitatis solenne*, and *ordo sacer*, are impediments that need no particular observation. The *crimen adulterii* became an impediment in this manner: If any one, during the life of his wife, contracted matrimony or espousals with another, and a *carnalis copula* ensued, and the woman knew he had another wife, such marriage could not afterwards be established even by the death of the first wife: but if she was ignorant of his having another wife, and no *carnalis copula* had taken place, the marriage might be contracted after the death of the first wife. *Impotentia*, if natural, would both impede and dissolve marriage; and so, if accidental, and before the marriage; but if the accident happened after the marriage, it had not that legal consequence.

Other impediments there were, which only impeded, but did not dissolve marriage. These were *furor, interdictum, feræ, catechismus, votum simplex, crimen*. A

person who was mad, might, however, during a lucid interval, contract marriage. The *feriæ*, within which marriage could not be celebrated, were from Advent to Epiphany; from Septuagesima to the octave of Easter; and from the first Rogation-day to the octave of Pentecost. Catechism was considered as an impediment, on account of the spiritual cognation which was supposed to be thereby created.

The crimes which impeded, but did not dissolve, marriage were these: *incestus, uxoricidium, raptus, susceptio proprii filii de fonte, presbytericidium, pœnitentia solemnis*. The manner in which incest was an impediment, is thus explained by the canonists: If a person committed incest with a person in consanguinity with his wife, and of course in affinity with him, this fact made him assume an affinity with his wife, so as to disable him from claiming the conjugal rites during her life, and, when she died, from contracting matrimony. The impediment from receiving his own child from the font, was, in like manner, that he could not demand of his wife the conjugal rites. A person who killed his wife (and so also a wife who killed her husband), or one who killed a presbyter, or who had incurred the punishment of any solemn penance, could not contract matrimony. It was required by the canons, that a marriage should be celebrated publicly in the face of the church, or in some assembly of the faithful, representing the church; and the parish-priest, or some one by his permission, was to pronounce his benediction (a).

We shall now add a few words on *clandestine* marriages. These were so called if contracted without witnesses, and as it were by stealth, without any of the solemnities requisite to the celebration of all lawful marriages. The requisite solemnities were, that the marriage should be propounded by the priest, who was to fix a time, within which

(a) *Corv. Jus Can.* 85 to 102. *Launc. Inst. Jur. Can.* lib. 2. tit. 11, 12, 13.

for orders. It was held, that a person marrying a woman, who was married to another, but not carnally known by such stranger, was not a bigamist; nor one who had had many concubines, if he had undergone penance, and had been dispensed with. The latter therefore was not considered such an *irregularity* (for so bigamy was termed) as to render a person unfit for the duties of the church (*a*). The credit that was given by our courts of common law to the bishop's certificate in cases of bastardy and bigamy, has been too often mentioned to need being enlarged upon in this place (*b*).

Such was the law of marriage, as delivered by the canonists, and adopted by our ecclesiastical courts for their rule, in deciding upon matrimonial causes. To these it will be necessary to add some points of a juridical nature relating to marriage, which were peculiar to our own law, and occasionally had been agitated both in our lay and spiritual courts. In our spiritual courts we find a suit spoken of by writers of *Jactitation of the next period, called jactitation of marriage,*

and which probably existed at the time of which we are now writing. This was a proceeding to clear a person of a matrimonial contract, which was pretended to exist by the other party. A suit, as was before seen, might be brought in the ecclesiastical court by a man for recovery of his wife, if she was taken from him, provided the action was merely to have possession of her; and yet he might also have an action of trespass to recover her; and also, if the case was of that sort, an action *de uxore abductâ cum bonis viri* (*c*). If a man lived separated from his wife, an action might be had in this court to compel him to receive her and cohabit with her; and this provision of the canon law, as has just been shewn, was supposed to be also sanctioned by an expression in stat. 13 Ed. I. c. 34 (*d*).

(*a*) Corv. Jas Can. 44.

(*b*) Vid. ant. vol. I. 466.

(*c*) Goodall, of the Liberties of the Clergie by the Lawes of the Realme, printed by Rob. Wier, tempore Hen. VIII.

(*d*) Vid. ant. vol. II. 211.

It appears also, that goods promised with a woman in marriage were demandable in this court, after the marriage celebrated : but upon this had arisen some difference of opinion. We have before seen a distinction between a contract to give money, if a person will take to wife a woman, and a promise of money with a woman in marriage ; the former being held a temporal matter, the latter such as was proper for this court (a). It may be doubted, whether the judges were now so nice as to make any distinction upon the wording or form of such agreements, unless they were by deed, and then there was no dispute ; but they were purely lay contracts (b). For in 14 Ed. IV. where the declaration merely stated that he had married the daughter of the defendant, and that he should have twenty pounds in respect thereof, all the judges of the common-pleas held, that upon the face of it, this was only determinable in the court christian, *being of the same nature as the marriage* (c) ; and it is collected from the Register, that for marriage money, and pensions, suit was invariably to be in the spiritual court (d). Mention is there made of such a suit brought against the executors of the person promising, and it being held good, a consultation was granted (e). Indeed, this seemed to be the settled opinion, which prevailed in the two following reigns, and long after. On comparing these cases, we find the law as delivered by Bracton at length re-established and confirmed (f). It was also said, that where a man gave goods with his daughter in marriage, and she was afterwards divorced, he might have a suit in this court to recover the goods (g) ; but this must be understood of a divorce for some impediment, and not upon the woman's adultery (h).

(a) Vid. ant. vol. III. 65.

(b) 45 Ed. III. 24.

(c) 14 Ed. IV. 6.

and 17 Ed. IV. 4.

(d) Reg. 46. 48. Bro. Prob.

(e) Reg. 46. b.

(f) Vide ant. vol. I. 454.

(g) Vide Goodhall.

(h) An Apologie,

4c. 25 to 27.

Of wills and testaments. Notwithstanding wills, and the administration of intestates' effects, were objects of ecclesiastical judicature, these were matters of such jealous concern, that the parliament had more than once interposed to lay down rules for the government of bishops in the article of administration in cases of intestacy. It had been ordained, first, that the ordinary should pay the debts of the intestate, the same as an executor (a); and, secondly, that the ordinary should, in such case, always grant administration to the next and most lawful friends of the intestate (b). When these grand points were adjusted, the mode of accomplishing either was left to be settled by the ecclesiastical jurisdiction. Upon this head several constitutions had been made, one of them so far back as the reign of Henry III.

It was ordained by a legatine constitution of cardinal Ottoboni, that no executor should be admitted to the execution of any testament, nor should any testament be proved by him before the ordinary, according to the established custom, till he had, if a layman, expressly renounced the privilege of his own temporal court. Such was the contest in these days concerning the jurisdiction over testamentary questions, that it was thought necessary to bind an executor not to avail himself of this difference of opinion. The constitution further ordains, that executors, before they received administration of the effects, should make an inventory in the presence of credible persons, who were acquainted with the effects of the deceased, and exhibit it to their superior prelate. If any one presumed to administer before he had made an inventory, he was to be punished at the discretion of the bishop (c). There are two constitutions of *Stephen Langton* on the subject of testaments, made by ecclesiastics. By one it was ordained, that no beneficed clerk should leave any thing by testament to his concubine; and if he did, that the whole bequest should,

(a) Vid. ant. vol. II. 167. (b) Ibid. 387. (c) Const. Ottobon. tit. 14.

by the bishop of the diocese, be converted to the use of the church which the deceased person held. By the second it was ordained, that religious persons, as from the design of their rule and order they were to have no property, so they should not make any testament; which was conformable with the rule of the pontifical law (a).

If religious persons had no property of their own, they were deemed unfit to be trusted with the property of others. It had accordingly been ordained, in a constitution of archbishop Boniface, in the time of Henry III. that no religious persons of whatever order should be executors of testaments, unless by the licence and pleasure of their ordinary. This was softened by a constitution of archbishop Peckham in the reign of Edward I. which required that no religious person should be executor, unless his superior was security for a due performance of his duty, and for his rendering a faithful and true account of the overplus to the ordinary of the place: and because some persons wearing a religious habit got themselves to be appointed *distributors* of the effects of deceased persons, as if that was not within the provisions concerning executors, it was now ordained, that the above regulation should apply in both cases; and any one who, without such security, intermeddled in the execution or distribution of such effects, was made liable to the pain of an anathema; so that those who could not give security, could neither be executors nor distributors (b).

The next legislative provision on the subject of testaments, is a constitution of archbishop *Mepham*, in the beginning of the reign of Edward III. This was to repress a grievance which was a subject of great complaint during the whole of that king's reign. It seems that ordinaries used to exact of executors great securities for the insinuation or proving of testaments, and the commission of administration, in order to extort heavy fees and douceurs.

(a) Lynd. 166, 167.

(b) Ibid. 167, 168, 169.

To prevent this in some degree, it was ordained, that for the insinuation of a will of a poor man, the inventory of whose goods did not exceed one hundred shillings sterling, nothing at all should be demanded (a).

Another constitution made by archbishop Boniface in the reign of Henry III. was revived, and re-enacted by archbishop Stratford in the reign of Edward III. Complaint had then been made, and the same cause continued in the latter reign, that where persons, whether clergy or lay, died intestate, the lords of fees did not permit the debts of the deceased to be paid out of their moveables, nor distribution to be made by the ordinary to the use of the wife, children, relations, or others, in such proportion as was due to each, according to the custom of the country. Others, again, prevented persons who were *adscripti*, and of servile condition, and women, whether married or single, from making their wills; all which was stated to be in violation of the usage of the church hitherto approved, as well as an offence to the Divine Majesty, and the ecclesiastical law. Such are stated to be the abuses which now prevailed on this subject. For the correction of them it was now ordained, that all persons in such case offending should be involved in a sentence of the greater excommunication. It was further provided, that when a testament had once been proved and approved before the ordinary of the place, it should not be required to be proved and approved before any layman, unless by reason of any lay fee which might be bequeathed in such testament. It was enjoined, that none should presume to prevent the effect of any testament or last will, where a bequest was warranted either by particular custom, or the general law. All offenders in the above cases were declared to be involved in a sentence of the greater excommunication.

The article of inventories was again provided for in this constitution. It was ordained, that administration should not be granted to an executor, till a faithful inventory had been made of all the goods, with an exception only of the funeral expences, and those of making such inventory. The time of delivering this inventory was left to the discretion of the ordinary. Farther, it was provided, as had been before done in the case of religious persons, that after the will was proved, the administration should not be committed but to such persons as were able to give a good account of their administration; and, if necessary, give good security, and make faithful promise so to do, whenever they should be required by the ordinary. As to religious persons, they were not to be executors without the permission of their ordinaries. It was also enacted, that out of the portion that belonged to the dead man, the church should receive its accustomed due; meaning the *mortuary* that was due by the custom of some places.

To prevent all pretences that might be made use of to embezzle the effects of the deceased, Executors. it was ordained, that no executor should appropriate any goods of the deceased under title of a sale, or by any other pretence, unless a gift of them had been made by the testator *inter vivos*, or by will; or they were given to him by the direction of the ordinary for his trouble; or any debt was owing to him from the deceased; or they were taken as a moderate compensation for the expences of the administration. If he had none of these excuses, a person appropriating any goods of the deceased, would be suspended *ab ingressu ecclesiæ*; nor should be absolved till he had restored the things so unjustly appropriated, and double the value out of his own goods to the fabric of the church to which the deceased belonged (a).

The liberty taken with the goods of deceased persons was a matter of great scandal to the church, and great oppression to the people, and was much complained of during the reign of Edward III. In the 16th year of that king, the extent of this evil is thus stated in the preamble of a constitution by archbishop Stratford. It recites, that some ecclesiastical judges would not permit the executors of deceased persons to dispose of their goods according to the direction of their testators, and the sanctions both of the law and the canons; that they took to themselves the moveables of testators, and of intestates (which after the payment of debts should be applied to pious uses); and so sometimes distributed them at their pleasure, both excluding the deceased and their creditors: in consideration whereof many persons, when sick, used to alien their moveables, so that churches were defrauded; and creditors, children, and wives, who by law and custom ought to have their shares, were deprived of their due (a). Such were the abuses; and the remedy provided for them was as follows. It was ordained, that bishops and other ecclesiastical judges should not intermeddle in effects of testators, except so far as the law permitted, under any pretence whatsoever, but should freely permit the executors to dispose of them; and it directs that they should distribute the goods of intestates in this manner: such as remained after payment of debts, were to go *ad pias causas, et personis decedentium consanguineis, servitoribus, et propinquis, seu aliis, pro defunctorum animarum salute*; and the ordinary was to retain nothing to himself, except, perhaps, something reasonable for his trouble, under pain of suspension *ab ingressu ecclesie* (b). The provisions of this constitution did not yet remedy the evil: instead therefore of calling again upon the ordinaries to fulfil the duty hereby enjoined, it was judged a better regulation to remove the administration intirely

(a) Johns. Canons, *ad annum*.

(b) Lynd. 179, 180.

out of their hands; which was done, as we have seen, by stat. 31 Ed. III. which commands the ordinary, in case of intestacy, to depute *the next and most lawful friends* of the intestate to administer his goods(a).

By another constitution of the same archbishop, the fees to be paid in cases of wills were fixed. It was ordained, that for the proving, approving, or the insinuation of a will, nothing should be taken by bishops or ordinaries; but to the clerks, a certain reward for their trouble was to be paid. The particular sums to be paid for insinuation, inventory, acquittances, for hearing the account, are prescribed by this constitution in proportion to the value of the effects; if any one took more, he was, within a month, to pay double the value to the fabric of the church of the place; if he neglected so to do, the offender, being a bishop, was to be suspended *ab ingressu ecclesie*, if an inferior, *ab officio et beneficio*, till he complied. It was also ordained, that no acquittance should be made to an executor, till he had given a true account of his administration, under pain of suspension *ab ingressu ecclesie* for six months (b).

Such were the provisions made, at different times, by the ecclesiastical legislature, upon the subject of wills and intestacy. Both these articles are very fully considered

(a) Vid. ant. vol. II. 387.

(b) Ibid. 181, 182, 183. There is a provision among the legatine constitutions of cardinal Ottoboni, which commends the practice of distributing the goods of intestates in *pious usus*, and directs that bishops should make distribution according to a statute made by the prelates, with the approbation of the king and barons; meaning, as it should seem, that some statute had been made to warrant such distribution in *pious usus*. This constitution was made in 52 Hen. III. John de Athona in his gloss on this passage says, that the stat. Westm. 2. 13 Ed. I. c. 19. which requires the ordinary to pay the debts of the intestate, as an executor should, was the statute here meant; which anachronism is very singular in a writer who lived so near the period. Bishop Gibson confesses he cannot discover what statute is here alluded to. It is not easy to suppose, that the provision of *Magna Charta* is here meant. Vid. ant. vol. I. 244. and the references there made. Leg. Const. Ottoboni, tit. 14. John de Athona, *ad locum*.

by our two canonists, *Lyndwood* and *John de Athema*, from whose glosses we are to collect what were the opinions prevailing in the clerical courts respecting these two objects of ecclesiastical cognisance. With the assistance of these writers, we shall be able to acquaint the reader with the law upon this head. We shall begin with *wills*.

Of the forms of wills, &c. It should first be observed, that *wills* were of two kinds; that is, *testamentum*, and *ultima voluntas*; and all the foregoing constitutions make use of both these terms, so that their regulations are applicable to both. The doctors, however, made a difference between them. The former was a more solemn act, attended with all the forms prescribed in such cases by the law books: if any of these forms were wanting, it was not a testament, but a mere declaration of the *ultima voluntas*. A *codicil* also might go under this title: thus, in our ecclesiastical law, a *testament* and a *last will* seemed to be nearly the same thing in effect (a); and we shall accordingly use the word *will*, without any reference to a distinction between that and a testament.

We have seen, that the right of wives and of persons *adscriptitii*, and others *servilis conditionis*, (meaning, probably, such as held by villain tenure, though not villains themselves) to make wills, was vindicated by a constitution of archbishop Stratford. This constitution is supported by *Lyndwood*, who lays it down, that all persons may make wills, except those who come under any of the following descriptions: first, those who had no sufficient authority, as sons, actual villains, monks, hostages; secondly, those not having sufficient understanding, as an infant, madman, *mente captus*, and prodigal; thirdly, those who had not sufficient senses, as the blind, deaf, and dumb; fourthly, those condemned to death or to banishment; and, fifthly, those whose true state and condition

(a) *Lynd.* 173. h.

was not known. Such persons are allowed by Lyndwood to be properly excepted by all the doctors from the privilege of making a will ; but as a married woman is not mentioned among these exceptions, he expresses great astonishment, that in his time husbands endeavoured to prevent them from making wills ; and he combats this position with great earnestness.

As to the objection that wives have *nulla bona*, no goods of which to make a will, but that they all belonged to the husband, so that she could not make a will without his permission ; he said, that this might, indeed, hold as far as concerned the husband's own goods, (though there were some doctors who thought the married state gave the wife dominion over her husband's goods), and he admitted that his permission was necessary to her making a will of any part of *them*. But he contends, that there was a distinction, which made certain goods the property of the husband, and others the property of the wife ; for, says he, the prohibition which prevented any gifts between man and wife (a) during the marriage, could have no application, unless they had distinct goods : the same may be said of the rule of the canon law, that goods produced from the goods of the husband and wife should be divided equally when the marriage ceased, and that rule which gave the wife's portion back to her upon the dissolution of the marriage. He admits, however, that the husband had power over the wife's portion, and that what was gained by the wife during the marriage was presumed to be gained out of her husband's goods, and she clearly could not bequeath them. These restraints, therefore, upon the wife were, where it did not appear whence she had made her acquisitions ; and he seems to think, that where a rich woman married a poor man, and the acquisitions of the wife could not be supposed to be made out of his pro-

(a) Vid. ant.

perty,' she would not be restrained from making a will without her husband's consent. He seems to think, that the position which made a husband master of his wife's property was true *in dotalibus*; but this held only *quandiu bene administrat*; and so long as he was not suspected, nor declining in his circumstances, he was master so as to administer them. But though he was *dominus in dotalibus*, he lays it down peremptorily that he was not so *in rebus paraphernalibus*; for these belonged to the wife even during the marriage, and she might freely make a will of them without her husband's consent. The *bona paraphernalia* are defined by Lyndwood to be, *quæ uxor habet extra dotem* (a). If we refer to the judgment of the common law, we find it laid down, that a wife might, with the licence of her husband, make executors; but his agreement was considered as necessary to make the will good: she might also make her husband executor to her will (b).

Next to the *testator*, we should consider the situation of the *executor*, whom he deposes to execute the will he has made. Many points of law concerning the duty and character of executors are agitated by *John de Aithona*, in his famous gloss on a constitution of cardinal Ottoboni (c). We learn from him, that a minor of seventeen years old might be an executor by a particular custom, though not by the canonical law. It was by custom also, that a woman might be made an executor. It was a point much debated among the canonists, whether an executor was compellable to take upon him the trust; and some had held that he was, because it was a public duty, and a public duty every one was bound to discharge. But this opinion is thought by our glossist to apply to what he calls *executor legitimus*, and not to a testamentary executor, who certainly was at liberty to decline; because no man could impose a duty on another beyond the benefit he received: though when

(a) Lynd. 173. b.

(b) 4 Hen. VI. 31. 39 Hen. VI. 27.

(c) Tit. 14.

once he had undertaken such duty, he might be compelled by ecclesiastical censures to fulfil it. Another question among the canonists was, whether, when there were more than one executor, they were all to concur in being *actor* or *reus* in an action, or in making an agreement. If they were considered in the light of procurators, as some held, they could not act alone; but others held, they were rather in the nature of tutors and curators to minors in the civil law, and then each might act singly for the rest. This latter was the opinion of John de Athona, who says, the custom of the realm was such in the temporal courts in his days; though he admits, that in judicial matters it was necessary for them all to join.

Another question was, whether such action as an executor had against his testator, was extinct by the executorship. Some thought that it was; others, that it was not, considering there was an heir against whom an action might be brought: though if there was no heir, it was the opinion of our glossist, that the executor might, without any breach of trust, openly take what was owing to him; and he adds, that any legacy left to him, ought not to deprive him of his *actio funeraria*. After this, there could be no doubt, as it was with some of the foreign canonists, whether any and what action could be brought by an executor; distinguishing between a *nudus executor*, and one who had an interest. It was held, that every executor might bring all actions that related to the administration of the last will; and if he omitted to bring such as were necessary, the diocesan might. Similar to the last was the question, whether an executor might come to a compromise or make any agreement with the heir or any debtor of the testator. Some thought he could not remit a debt any more than a *procurator ad agendum*, unless, perhaps, with the consent of the legatees and creditors, who were materially interested; or he had a special authority from the testator so to do. Others thought, that as it might be paid

to him, and he might bring an action for it, especially if he was deficient in proofs, and a suit would be hazardous, he might compromise a debt.

In the time of John de Athona it was a question, whether an executor should give security for a due administration; and then a distinction was made between a testamentary executor, and one appointed by the ordinary, who was called *legitimus*; and it was held, that the former need give no security: but we have seen, that by later constitutions, executors of every kind were required to give security (*a*). He also examines, whether, in giving an account of their administration, it was sufficient to verify what they did upon their oaths; which points we shall consider presently. When an action was brought, either by creditors or by legatees, against an executor, they were not bound to shew the sufficiency of the property to satisfy their demands, but that was to be presumed till the contrary was shewn by the executor. Another question in the time of John de Athona was, whether an executor might buy any goods belonging to the testator; but this was afterwards settled in the negative by constitutions before mentioned (*b*). As to the point, whether the heir or the executor should be proceeded against by a creditor or legatee, it was held by some, that the heir should; by others, that it should be the executor, in all cases of demands on the moveables; but our glossist says, that this must, after all, lie in the option of the claimant (*c*).

Of probate. When the will was made, and the executor appointed, then was the authority of the bishop necessary to carry it into execution. The bishop's authority applied to these points: the proof and insinuation of the will, the making an inventory, the committing of administration to the executors, and, lastly, the demanding of

(*a*) Vid. ant. 69. (*b*) Vid. ant. 69. (*c*) John de Athon. in Const. Ottoboni, tit. 1^a. per totum.

the executor an account of his administration (a). The regular course was, that the proof of a will should be before the ordinary of the place where the testator died ; and formerly, when a person had effects in more dioceses than one, they contented themselves with one probate ; but the ordinary of each diocese was to give administration of the goods within his diocese, and was to call the executor to account. Thus stood the practice in the time of Edward I. as appears by the constitution of cardinal Ottoboni, and the gloss of John de Athena thereon, so often referred to. But at the time of which we are now writing, a different practice had obtained ; for we are informed by Lyndwood, that the archbishop of Canterbury, in his province, took to himself, as well the proof and insinuation of all wills, as to commit the administration of the goods, and to call the executors to account, in all cases, where the testator had *bona notabilia* in different dioceses within his province. This prerogative of the archbishop had given rise to much argument on the meaning of *bona notabilia* ; and Lyndwood, upon the authority of constitutions, of doctors, and of reason, takes upon him to pronounce *bona notabilia* to be such, whose possession would exempt the owner from the description of *pauper* : but, proceeds he, one who has less than one hundred shillings sterling is a *pauper* ; from whence he concludes, that one having less than one hundred shillings had not *bona notabilia* (b).

The probate of the will is spoken of under different terms by our great canonists ; the *probatio* or *publicatio*, and the *approbatio* or *insinuatio* ; the two former denoting the act of the executor ; the two latter, that of the bishop. The will of the deceased person was required to be *proved* by two witnesses who were *omni exceptione majores*. When that was done, the ecclesiastical judge was to give his *approbation* to the proof (c). It was only in

(a) Lynd. 179. t.

(b) Ibid. 174.

(c) Ibid. 174. f. g. h.

respect of the *bona*, or moveables and personalty, that a will became the object of cognisance to the ecclesiastical judge; he pretending no claim over a devise of a lay fee; but if a will contained both, it was necessary that it should be approved by the spiritual judge.

The making of an inventory, which was the next step, and was so earnestly pressed by the abovementioned constitutions, was as requisite for the security of the executor as of the effects; for it had become a rule of the canonists, that where a person intermeddled in the administration without having made such an inventory (except for the expences of the funeral, the probate and inventory, and the necessary preservation of the property), a presumption was raised of sufficient assets, and he was bound to answer to every one of the creditors (*a*). If no inventory was made, the acts of the executor were still valid; but he might be removed, as a suspected person, by the ordinary (*b*). It is said by Lyndwood, that debts which were not secured by some instrument or obligation, need not be inserted in an inventory till they were received (*c*).

The *sufficiens cautio*, which was required by the above constitutions, created some doubts among the canonists; for a *sufficiens cautio* might be of three kinds: it might be either *pignoratitia*, *fidejussoria*, or *juratoria*; and it seems to have been left to the discretion of the ordinary which of these he would take. If a person was suspected, he would be required to give one of the two former; if he was a credible person, the latter was sufficient (*d*). Another consideration which weighed in this point, was the situation of the executor: if he derived any benefit under the will, he was to give one of the former securities; but if he was a mere *nudus executor*, he was not required to give either of the higher securities. Another consideration seems to have been, whether he was a testamentary

(*a*) Lynd. 176. p.

(*b*) Ibid.

(*c*) Ibid. 168. b.

(*d*) Ibid. 169. a.

executor or appointed by the ordinary, and so called *legitimus*; for the former, being a person entrusted by the testator, ought not to be suspected by the ordinary; and therefore the latter security of an oath was thought sufficient in such case; nor was that to be required till the administration was completely finished (*a*).

After the ordinary had committed administration, he might remove the executor, if there was any suggestion of fraud and mismanagement of the effects (*b*), or if he could not give a good account of his administration. In taking an account, the bishop seems to have had the same discretion as in taking caution for a due administration. According to the character and circumstances of the parties, he might require a *plena probatio*, or content himself with the oath of the executor; and as to the account, he might require it to be more or less particular (*c*).

In giving a true account of his administration, it must arise very often that the executor would have a residuum, either by reason of legatees dying before the testator, or by reason of the effects exceeding the dispositions made in the will. In such case, the law is thus laid down by Lyndwood: if the executor was a *nudus minister*, who was to have no benefit, he could not apply this residue to his own use; but where the executors, says he, are *executores universorum bonorum*, such persons being *in loco hæredum*, were to take every thing that was undisposed of by the testator; and yet, says he, such an executor would do well, if he disposed of the overplus by the advice of the ordinary (*d*). In the other case, the testator would be considered as dying intestate with regard to such undisposed property.

The consequences of intestacy were not much better ascertained than they were before the

Of intestacy.

(*a*) Lynd. 170. h. (*b*) Ibid. 177. g. (*c*) Ibid. 168. l. (*d*) Ibid. 179. e.

stat. 31 Ed. III. The difference merely was, that instead of trusting to the discretion of a bishop for distributing the effects *in pios usus*, the administration was to be committed to the next and most lawful friends of the intestate, who were to administer, and dispend them for the soul of the deceased (a). The text, therefore, of the canon law was still the rule by which the administration was to be governed; and we must recur to our provincial constitutions to learn what was such an application of the property as might be said, according to the notions of these times, to be for the benefit of the deceased person's soul. The constitution of archbishop Stratford abovementioned directs that the goods of an intestate which remained after the payment of debts, should be distributed *ad pias causas, et personis decedentium consanguineis, servitoribus, et propinquis, seu aliis, pro defunctorum animarum salutē*.

The interpretation put upon *piæ causæ* by the canonists was extensive. We are informed by Lyndwood, that any person who was an object of compassion; an orphan, widow, or pauper destitute of support from himself; those rendered infirm by disease or age, being also poor; all such were objects that came under the description of *piæ causæ*. They also reckoned under the same head, the watching of a city, the repairing of bridges, roads, walls and ditches of a city or castle, and the like, particularly in cases of necessity. To these they added, as might be expected where churchmen were the interpreters of the law, the ornaments and fabric of churches, lights, anniversaries, and incidents relating to divine worship: gifts *pro emendandis forefactis*, and *pro malè ablatis*, were deemed of the same kind. In general, any thing given *pro animâ*, was judged to be of this description; and yet a gift to a father or mother *pro animâ*, was not so esteemed unless they were poor (b).

(a) Vid. ant. vol. II. 387.

(b) Lynd. 180. d.

The *piæ causæ* being ranked as the first objects of consideration in this constitution, it should seem as if nothing was to go to the *consanguinei*, and the others there mentioned, till some portion had been first bestowed on some of these righteous purposes. After these follow the *consanguinei*, the *servitores*, the *propinqui*, and *others*. The church had laid down to itself a different rule for the distribution of the effects of a layman and a clerk, and of a beneficed and non-beneficed clerk. If a beneficed clerk died intestate, the goods which accrued to him by means of his benefice were, by the canon law, to go to the successor; those that had become his property on other personal considerations, were to go to the *consanguinei*, and, upon failure of them, to the church. The same of a clerk not beneficed; only provision had been made in the early times of Christianity, that the widow should come in after the *consanguinei*, and before the church. In case of laymen intestate, upon failure of the *consanguinei* and the widow, the *fiscus* was to succeed. The manner in which the *consanguinei* were to be reckoned, is thus laid down by Lyndwood. The first consideration, says he, in the succession *ab intestato*, is that of the children; the second, of the ascendants, with some collaterals, if any are extant; the third, of the transverse line; the first two being extended *in infinitum*; the third only as far as the tenth degree, whether *agnati* or *cognati*. Upon failure of these, and not till then, if there was any widow of the deceased, she was to succeed; and after her the *fiscus* (a). The portion to the *servitores*, was to be according to their several merits. *Propinquus* might be understood either of blood or neighbourhood, and the *others*, according to Lyndwood, must be poor persons; who having before been reckoned among the *piæ causæ*, were thus doubly provided for (b). The whole of the effects was to be distributed in the above way; formerly by the ordinary

(a) Lynd. 180. f.

(b) Ibid. 180. h. i. k.

(without reserving any thing to himself), but since the stat. 31 Ed. III. by the next and most lawful friends, in such proportion to each of those objects, as seemed good to the person distributing. It is made a question by Lyndwood, whether under the description of *consanguinei* or *propinqui*, any thing could be demanded *de jure* by bastards and spurious children; which he answers himself in the negative: but he thinks they ought to be considered under the light of poor persons, and should be provided for *per viam eleemosynæ* (a).

Such was the rule of the ecclesiastical law respecting the distribution of intestates' effects, if that can be called a rule which was no direction, and that law which had no sanction to enforce it; for the proportion to be assigned to each of the objects intended to be benefited, is no where ascertained. This was to depend, first, on the discretion of the administrator; and, secondly, on that of the bishop, to whom he was to be accountable; and the person who was to be intrusted with this charge, was to be chosen by the bishop, under no other restriction than that of being next and most lawful friend of the deceased. It cannot likewise but be remarked, that the postponing of the widow to the descendants and ascendants *in infinitum*, and to the *agnati* and *cognati* as far as the tenth degree, was a very inequitable and unjust disposal of the husband's property, and could hardly be palliated by the probability of his having lands, out of which she would be intitled to dower.

The *rationalis
lis pars.*

The correction of these inconveniences was to be sought elsewhere. In different parts of the kingdom particular customs prevailed, which controuled the general law of intestacy. The custom of a province, of a county, of a city, or a district, was to be found in numberless places, and the property of deceased persons was

(a) Lynd. 180. c.

thereby divided with more certainty, and with less interference and discretion of strangers. In some places it was the custom, if the deceased left a wife and no children, that half of the goods were considered as the part of the deceased, and the other half went to his wife; the same if he left only children; if a wife and children, then a third belonged to the deceased, and the other two-thirds to the wife and children; if there was no wife, nor children, then the whole belonged to the deceased. In some the wife took all; in others, the children: and when goods were in places where different customs prevailed, they were to be divisible according to the custom of the place where they were respectively found (a). If no disposition was made to the deceased person's third, or half, as the case might be, that also became subject to a like division, according to the custom.

Of all these customs, that which gave a third to the wife, another to the children, and a third to the deceased, and in case of only a wife, or only children, the half, was most frequently met with; and it seems to have so generally pervaded the kingdom, as to be mistaken for the general law of intestacy. Indeed this claim of the wife and children, where it prevailed, had been carried still further: it had been construed to be such an inherent right in them, as to restrain the power of disappointing them of this *reasonable part of the goods* by will; the possessor, it was contended, having a power of disposing by will of nothing but his portion, or *dead man's part*.

We have before had occasion to relate the discussion that this claim, at different times, raised in our temporal courts (b). The question had all along been, whether this was a common-law right, or one supported only by the special custom of different places; and the last determinations in the reign of Edward III. seem to countenance the latter opinion. Conformably with those decisions, we

(a) Lynd. 172. l. m. 178. a.

(b) Vid. Ant. 67, &c.

find an action in the reign of Henry VI. (a) and another in the reign of Edward IV. (b) against an executor for a reasonable part, where a special custom of a county is alleged. There is an instance of one action, which was grounded upon the usage generally, without stating it to be of the realm, or of any county or place (c). If we look a little further on in our juridical history, we find it laid down positively by Fitzherbert and others, in the reign of Henry VIII. that this claim of the wife and children was by the common law that prevailed through the whole realm; and that the action *de rationabili parte* might be maintained against the executors (d); so that the power of making a will was, in case of leaving a wife or children, confined to the dead man's part. This opinion seems to be strenuously maintained by Brooke, some time after the reign of Henry VIII. Thus stood this question about succession to personal property, whether in case of a will or intestacy, in the reigns of Edward VI. and Queen Mary, and for some years after.

Before we leave the subject of wills and intestacy, it will be proper to lay before the reader such few notices on the point of jurisdiction, as are to be found in the books of common law. And first with regard to executors, and the suits they might bring, or be liable to, we find it very early laid down, that a man could not generally sue an executor in the spiritual court for the testator's debt; yet if the testator enjoined the executor to pay such debt, then he might sue for it in the spiritual court, because of the injunction and promise: and this was considered as law, so low down as the reign of Henry VIII. (e). An executor might sue another in this court for the testator's goods: as where goods were bequeathed, and a stranger obstructed him

(a) 28 Hen. VI. 4.

(b) 7 Ed. IV. 20, 21.

(c) 30 Hen. VI. 95. Bro. Racion. Part. 7. (d) Bro. Racion. Part. 6.

(e) 6 Hen. III. Fitz. Proh. 17.; and vid. Goodall, &c.

in bestowing the legacy, the executor might sue him in this court (a); but if the goods bequeathed were taken from the executor, he must bring trespass, and could not sue in this court (b). So generally was it settled that legacies should be sued for in this court, and not in the temporal, that if a termor bequeathed his crop, this court would hold plea of it (c). Where one sued in this court for goods devised, which another claimed by deed of gift, and thereupon brought a prohibition, it was held, that being a legacy, it could only be determined in this court (d). Considering the legatee had such action, it was held, that he could not take the goods without the executor's consent (e); besides, the law did not oblige the executor to pay them, till the debts of the testator were paid (f). But where land was devised, the devisee might enter immediately, as he had no suit to demand it in the spiritual court (g). If any thing was bequeathed for the reparation of the fabric of a church, the executors might be sued in this court (h).

The article of tithes has not hitherto been mentioned in any other way than as an object of Of tithes. judicial cognisance, which was at different times disputed between the temporal and spiritual courts (i). It is only once that we were called upon to notice the nature of this provision for the clergy, and this was on the occasion of the statute of *sylva cædua* (k). In no other instance had the legislature thought it necessary to interpose for settling questions of tithe; and our temporal courts had no authority to prescribe any rules on this head. The decision, therefore, to ascertain "what was tithe, and what not," remained wholly with the spiritual court; and the clerical legislature. The nature of tithes, in this country, must be

(a) 4 Hen. III. Fitz. ibid.

(b) 2 Ric. III. 17.

(c) 37 Hen. VI. 9. 8 Hen. III. Fitz. Proh. 19.

(d) 46 Ed. III. 32.

(e) 20 Ed. IV. 9.

(f) 2 Hen. VI. 15.

(g) Vid. ant. vol. I. 455.

(h) Reg. 43. b. Vid. An Apologie, &c. 22, 23, 24.

(i) Vid. ant. vol. I. 70.

(k) Vid. ant. vol. II. 388.

collected from the constitutions of provincial synods, the volumes of the canon law, and the opinions of learned doctors. To these we must now resort; and we shall, with the assistance of our countryman Lyndwood, lay before the reader what appears to have been the opinions on this subject, which prevailed in our ecclesiastical courts during the reigns of Henry VI. and Edward IV.

The text of our law of tithes is chiefly comprised in three constitutions of the time of Edward II. These were made by *Robert Winchelsey*, archbishop of Canterbury, in different synods held for his province. The first of these is stated, at the opening of it, to be for preventing disputes, and for rendering the claim of tithes uniform through the whole province. It ordains, that the tithe of fruits should be paid in full (*a*), without any deduction for the expence of raising them, or any diminution whatever: the same of the tithe of fruits of trees, the tithe of all sorts of seeds, and the tithe of herbs in gardens, unless any adequate (*b*) composition was made for them. It declares, that tithe should be demanded of hay, wheresoever it grew, whether in large meadows or small, or even in the highways. The tithe of lambs was ordered in this way: if the number was six or less, six *oboli* were to be given by way of tithe; if they were seven, the seventh was to be given as a tithe, and the parson was to return three *oboli* to the person paying it, as a compensation to reduce the tithe to a fair tenth; if there were eight, the parson was to have the eighth, and give only a denarius as a compensation; if nine, the parson had the option to take the ninth, and give one *obolus* (*c*) to the parishioner, or to wait till the next year, when he might have his tenth lamb. The parson so waiting was allowed to take the second or third lamb, at least, of the second year, in consideration of his

(*a*) *Integrè*.

(*b*) The word in the original is *competens*.

(*c*) These are the terms in the constitution; and I do not pretend to solve the difficulties there are in the Latin names for our old money:

forbearance in the first year. The same rule which was here laid down about lambs, was directed to be observed in case of the tithe of wool. But if sheep were fed during winter in one place, and during summer in another, the tithe was to be apportioned. In like manner, if in the interval between those seasons any one bought or sold sheep, and it was certain from what parish they came, the tithe of such sheep was to be apportioned as the tithe of a thing which had two domicils: if the former parish was not known, then that parish within which they were sheered was to have the whole of the tithe.

It was required that tithe should be paid of milk; that is, of cheese in the season for making cheese; and of the milk itself in autumn and winter, when it was not usual to make cheese. But for these the parishioners might make an adequate composition, which was always to be to the value of the tithe, and in favour of the church. Tithe was required to be paid of the produce of mills; of pasture of all sorts (a), as well that which was not common as that which was, according to the time and the number of them. Tithe was required of fisheries and of bees, and of all other goods which were justly acquired, and were renewed annually. Personal tithes were also to be demanded of artificers and merchants for the gains of their trade, and of all workmen receiving a certain stipend; unless the stipendiary chose to contribute something in certain for the use or ornament of the church, and the parson consented to accept it (b).

The foregoing provision about the tithe of wool seems to have not sufficiently obviated the difficulties that followed upon the removal of sheep from one pasture to another. To ascertain this more minutely, it was provided by a

(a) The words in the original are *de pasturis et pascuis*, which are pastures of different kinds, in the construction of the canonists; the latter signifying pasture for sheep, in places not cultivated nor ploughed; the former all sorts of pasture.

(b) Lynd. 191 to 196.

subsequent constitution of the same prelate as follows : The tithe of wool, milk, and cheese, was to be fully paid to the church of the parish where the sheep were continually fed and couched, between the time of shearing (which was after the middle of May, and before the middle of June and the feast of St. Martin), although they were afterwards removed into another parish, and there sheared ; and to be certain of this payment, the sheep were not to be removed till security was given to the parson for payment of the tithe. If they were removed within those times to another parish, each church was to receive a proportion of the tithe, according to the portion of time ; provided that no account should be taken of any space of time less than thirty days. This provision must be considered as applying only to the tithe of wool, that of milk and cheese being to be received instantly at the parish where the sheep were fed and couched. Again, if the sheep fed in one parish, and couched in another, the tithe was to be divided between the two churches. If after the feast of St. Martin sheep were carried to other pastures, and till the time of shearing were fed in one or several parishes, either in the pastures of their owners or of others, it was ordained, that the feeding should be estimated according to the number of sheep, and tithe should be demanded of the owners according to such estimation.

The tithe of milk and cheese from cows and goats, was to be paid where they fed and couched ; and if they fed in one parish and couched in another, the tithe was to be divided between the parsons. Lambs, calves, colts, and other tithable younglings, were to be tithed proportionably, having respect to the several places where they were begotten, born and fed, and the time they were in the several parishes. It was left to the custom of different places to decide what should be paid for tithe, where the milk for the small number of cows was not sufficient for making cheese ; and what for lambs, calves, colts, fleeces,

geese, or such things as are too small to pay a certain tithe. If sheep were killed, or died by accident, after the feast of St. Martin, tithe was to be paid to the parish-church. If sheep belonging to one parish were shorn in another, the tithe was to be given to the parson of the parish where they were shorn; unless it could be shewn that satisfaction had been made for the tithe elsewhere (a).

To these two constitutions may be added a third of the same prelate, in which the articles subject to tithe are briefly summed up. It ordains, that tithe should be paid of milk (b); of the profits of woods, pannage, of woods and of trees, if sold; vivaries, piscaries, rivers, ponds, trees, cattle (c), pigeons (d), seeds, fruits, beasts in warrens; of fowling; of gardens; curtilages, wool, flax, wine and grain, turves in places where they were dug and made; swans, capons (e), geese, ducks, eggs, hedge-rows (f), bees, honey, and wax; of mills, hunting, handicrafts, and merchandise; as also of lambs, calves, colts, according to their value. In short, says the constitution, let satisfaction be made of all other things to the churches whereunto they by law belong; no deduction being made, in calculating the tithe, for the expences attending the production of the thing, except only in handicrafts and merchandise (g).

In the following reign, we find a constitution of archbishop Stratford upon the subject of *sylva cædua*. Persons, says that ordinance, had refused to pay tithe *de sylvis cæduis, et lignis arborum cæduarum excisis*,

(a) Lynd. 197, 198, 199.

(b) The constitution adds, that this tithe shall be paid in August as well as the other month; it is therefore probable, that people claimed to be exempt from such tithe during this month. This being the principal harvest month, men might think it hard to pay tithe of milk, while they were paying tithe of corn, and were obliged to feed their harvesters with the milk. Johns. Canons, *ad locum*.

(c) *Pecorum*.

(d) *Columbarum*. (e) *Caponum*; the Oxford copy has it *pavonum*.

(f) *Thenecii agrorum*.

(g) Lynd. 199, 200, 201.

though these cost less labour than the fruits of trees; alleging that they had never before paid it; and expressing a doubt, what was properly *sylva cædua*. To remove this doubt it was now ordained, that *sylva cædua* was that wood, of any kind, which was kept on purpose to be cut, and which being cut, grew again from the stump or root: of such wood, it was declared that a real or prædial tithe should be paid (a). This is a more satisfactory explanation than the negative provision made by parliament on this head, in the same reign, which has been before mentioned (b); and which merely declared, that wood of twenty years growth felled for ship-building, or the like uses, should not be construed to be *sylva cædua*: this statute, however, is a sort of evidence, that the definition contained in the above constitution was not sufficiently attended to.

Upon these legislative regulations for the due payment of tithes, several observations arise; which have not escaped the accurate and discerning Lyndwood. These contribute to open some difficulties, with which the subject would be otherwise embarrassed. As to the uniformity which the first of these constitutions was to introduce through the whole province, it had, according to Lyndwood, no other meaning than that tithes should be universally paid; for the different customs that prevailed in various parts of the kingdom, were still to govern with respect to the mode in which they were to be collected. Various were the customs by which tithe used to be collected. Thus it was the custom in some places to tithe corn in sheaves, in others it was tithed while loose; in some it was tithed in the field, in others in the owner's barn; in others it was carried to the parson's barn (c). The time of winter and summer, mentioned in the above constitutions, depended on the customs of different countries: in some places, sheep were removed from one pasture to another about Michaelmas, and were there fed till Candlemas, or St. Peter, or

(a) Lynd. 190.

(b) Vid. ant. vol. II. 388.

(c) Lynd. 192. f.

the Annunciation; in others they were removed at the feast of All Souls, and continued till the feast of St. Philip and St. James; and the winter accordingly was said to commence and finish at those several periods (a).

It depended upon custom what should be paid for any particular tithe: but such customs were always subject to this correction, that tithes being due, as the canonists held, *jure divino*, they could never be diminished in value below the just tenth, by any custom; though a custom was esteemed good which gave to the church more than the real tenth. If a custom could not diminish the value of the tithe, much less would it be allowed to take away the whole tithe: a custom, therefore, *de non decimando* was held to be bad (b).

Tithes were divided into *great* and *small*, and into *prædial* and *personal*. Among small tithes were reckoned wool, flax, milk, cheese, honey, wax, eggs, lambs, poultry, and the other productions of animals, the fruits of trees, and all the productions of gardens (c): the rest were considered as great tithes. Prædial tithe was that which arose from mills, piscaries, hay, wool, bees, and the fruits and produce of the earth: it was so called because it came from a certain place (d). Personal tithes were such as were paid rather in respect of the person than the soil, as from the profit of a man's labour and employment. Some articles were of a mixed nature, arising partly from the soil, and partly from the labour and employment of men; as lambs, wool, milk, and some other things; and it was a matter of argument among the canonists, whether these were properly prædial or personal tithes. But the better opinion seems to have been, that they were prædial. Yet the shepherd who had the custody of the sheep, was bound to pay also a personal tithe of his wages. It was material to ascertain, whether a tithe was of the former or

(a) Lynd. 194. b.

(b) Ibid. 199. r. n.

(c) Ibid. 192.

(d) Ibid. 192.

latter description ; because prædial tithes were due to the church of the parish where the land on which they arose was situated ; personal tithes to the church where the person paying them heard service and received the sacraments (a).

Composition for tithes. It is put as a question by Lyndwood, whether the parson could enter into a permanent

composition with his parishioners to receive less than a tenth ; and he answers it in the negative. For though, says he, a composition for tithes might well be made between clerks, yet it would not hold between a clerk and a layman. But in this there was a distinction: such a composition, if for tithes already due, was good ; but for tithes to be paid, a composition with a layman was held not to be good, unless sanctioned by judicial authority of the bishop (b). The composition therefore spoken of in these constitutions, must mean such a one as was to have no binding force on the successor, and was only to adjust payments that ought to have been made before. Compositions of both sorts seem to have been very common for small tithes.

Prædial and personal tithes might, by possibility, be due in consideration of the same thing. This was the case with respect to fish. If fish were taken in an inclosed place, a prædial tithe was due to the church of the parish where they were taken ; but if they were taken in a stream that passed from one place to another, then a personal tithe would be due to that parish-church at which the person taking them heard divine service and received the sacraments. This, however, was only where a person fished without paying any thing for such liberty ; for where he paid any rent or price, then a tithe of such rent or price was due to the church of the parish where the fish were taken : the same of the tithe of birds and beasts. The tithe of fish caught in the sea was considered by

(a) Lynd, 200. b.

(b) *Ibid.* 192. s. 194.

some as prædial ; though the better opinion was, that this was a personal tithe (a).

The tithe of mills, according to the above constitution, consisted in the tenth of their produce ; and this, says Lyndwood, could only be effected by paying the tenth measure of all the corn ground there, for the benefit of the lord or the miller. For it was not sufficient to pay the tenth of the rent, that being not the true value, as the tenant was to gain something beyond the rent ; but if the lord payed a tithe of the rent, and the tenant of his gains, every thing that was due to the church would be paid ; and if the parson preferred it, the tithe might be paid in that way. The produce of a mill was to be tithed as a prædial tithe, without deducting the expences ; but if the mill was sold, then the expences would be deducted ; and after that the residuum, which was the clear gains, would be tithed as a personal tithe. The expences were considered in three lights : those *in re*, those *circa rem*, and those *extra rem*. Thus, suppose a mill was bought for 100*l.* this was of the first sort of expence ; 20*l.* was laid out upon repairs of it, this was of the second ; and 10*l.* in workmen, horses, and the like, this was of the last sort ; in the whole 130*l.* If the mill was retained for six years, and yielded 10*l.* *per ann.* produce, one of that ten would be paid each year in name of tithe, without any deduction of the expences ; but if the mill was to be sold at the end of the six years for 150*l.* a personal tithe must be paid of the profit, after allowing all the expences. But some doctors, among whom is Lyndwood, thought that the expences *extra rem* should not in this case be deducted ; and therefore the profit to be tithed, according to them, would be 30*l.* (b). It was held, that where tithe was paid for milk, and cheese was made of the other nine parts, no tithe should be paid for such cheese ; but if the cheese was sold, a personal tithe

(a) Lynd. 195. q.

(b) Ibid. 195. c.

should be paid for the gains made thereby (a); so anxious were they that a tithe should be paid upon every possible gain (b). Personal tithes were due at the time when the gain on which they arose was received; but on account of the smallness of them, it is thought by Lyndwood, that they should rather be paid at the end of the year. They were due only of the clear profit: if a thing therefore, instead of being sold, was given away, or kept by the owner, it was not tithable, because there was no profit; but according to the opinion of some doctors, if the money wherewith it was purchased had paid no tithe, the thing which came in its place should be tithed (c).

The personal tithe that was demandable of the profit on merchandise, was a very serious consideration in towns and cities. In the city of London, there was a custom to pay by way of offering one farthing upon every ten shillings rent of a house, on Sundays and certain feasts in the year. It had been endeavoured to represent this as a payment in lieu of such personal tithe as arose from profit in merchandise; but Lyndwood combats this opinion with great earnestness. He contends, that if this is at all to be considered as a tithe, it is a prædial one, being paid in proportion to the rent, which is prædial; if so, how, says he, is the payment of a prædial tithe to be a reason for exempting a person from paying a personal tithe? But the ordinance of the city expressly calls this an offering, and therefore it cannot be in lieu of any tithe whatever. For these, among many other weighty reasons, he concludes, that the tradesmen, artificers, and merchants of London are not,

(a) Lynd. 194. p.

(b) The sweeping words in the constitution are *de omnibus bonis jure acquisitis*; upon which expression it is gravely laid down by Lyndwood, in conformity with some foreign doctors, that personal tithe was not demandable out of the gains of common prostitutes, as long as they continued in a state of impenitence; but when they became penitents, it might be accepted; and even before, provided the consent of the diocesan was obtained. Lynd. 195. o.

(c) Lynd. 195. y.

by reason of this offering, exempt from paying a personal tithe of their profit in merchandise and employments (a).

To secure the regular payment of these dues, all rectors, vicars, and chapellains, are enjoined by the above constitutions to admonish their parishioners of their duty in this respect to the church. If they disregarded such admonitions, they were to be suspended *ab ingressu ecclesie*; and if they still continued obstinate, were to be proceeded against with ecclesiastical censures. And farther, if the rector, through fear or indolence, was negligent in demanding his tithes, this neglect of the church's rights was to be punished with suspension till he paid a fine to the archdeacon (b).

To this account of the law of tithes given by our canonist, it does not seem at all necessary to add any thing from our books of common law. It was so expressly laid down by the statutes of *circumspectè agatis*, and *articuli cleri* (c), in what cases they were objects of spiritual or temporal jurisdiction, that there had rarely arisen any controversy upon that head. If they were not converted into lay chattels, or bound by any lay contract, or in particular cases, as if they did not exceed a fourth part of the benefice, they were clearly within the cognisance of the spiritual court. It must however be remarked, that there is a case in the time of Edward III. in the exchequer, where a king's debtor prayed process against a person who had part of his goods, and so rendered him less able to satisfy the king's demand; upon which the party appeared, and claimed the goods as tithe; the other did the same as parson; after this the person brought in by process pleaded to the jurisdiction. This plea, we are told, was not allowed, but the question was held to belong to the exchequer, because it was the king's suit. The reporter expresses his surprise, and adds, that neither the king's

(a) Lynd. 201. d.

(b) Ibid. 196, 197.

(c) Vid. ant. vol. II. 216, 221.

bench nor common-pleas would in like manner entertain suits for tithes (a). This case happened about twenty years after the proceeding for tithes by *scire facias* in the temporal courts had been taken away by statute (b).

Having gone through the three points of most intricacy in the common course of clerical judicature, causes of matrimony, of testaments, and of tithes, we shall pass on to those which involve less discussion, and therefore, though of great importance in themselves, require less attention in the student.

Spoliation. The title of benefices ecclesiastical, without touching the trial of the patronage, belonged to this court, and might be brought in question in two ways, either upon the avoidance or spoliation of a benefice: the former are declared to belong to the spiritual judge, by stat. 25 Edward III. *pro clero*, ch. 8. They might depend either upon death, resignation, deprivation, creation, or cession. Whether a church was full or not, or the clerk properly qualified, was triable by this court (c). The spoliation of a benefice was triable in this court, only where a clerk was in as an incumbent; for if he was in as an usurper of the church, which was full, or as a trespasser, the remedy was by action of trespass, and not by suit for the spoliation (d). If two incumbents were in, and they claimed by different patrons, no spoliation would lie, because the right of advowson came in question; but where they both claimed by one, a suit for spoliation lay (e).

Pensions granted out of churches, mortuaries, and oblations, belonged to this court, both by stat. *circumspectè agatis* (f), and by the common law (g). A pension might also be sued for at common law, by writ of annuity; but

(a) 38 Ass. 20.

(b) Vid. ant. vol. II. 378. How matters of equity became cognisable in the exchequer, by reason of the suit of the king, vid. ant. vol. III. 228.

(c) 32 Ed. IV. 24. (d) 44 Ed. III. 33. (e) 38 Hen. VI. 19, 20. An Apologie, &c. 31. (f) Vid. ant. vol. II. 216. (g) Reg. 47.

if the claimant went upon a prescription, and afterwards sued for it as a pension in this court, a prohibition would lie (a). It was held, in the time of Edward III. in an assise, to be a good plea to the jurisdiction of the temporal court, to say that the land was a church-yard (b): this was conformable with the law before laid down by Bracton (c); and it was once held, that if a person took trees in a church-yard, the remedy was not by trespass, but by suit in this court (d). That a parish or hamlet claiming a right to have a curate to perform divine service, might proceed to establish such right in this court, was considered as of long usage; notwithstanding, an action upon the case was held maintainable for such neglect (e). We find a suit for withholding a chauntry was deemed good, upon consultation; which being within the same reason, gives sanction, as it should seem, to the other case. That parishioners might be cited in a cause of *contribution* towards the reparation of the body of a church, is proved from the statute *circumspectè agatis* (f); from the Register (g); and from authorities in the time of Henry VIII (h).

It seems unnecessary to adduce any authorities from our statutes or books of common law, to shew what countenance had been given to the judicature of this court, in the punishing of offences that savoured of impiety. If a court christian has any jurisdiction at all, it is surely in matters of this nature; and the legislature, instead of making any special recognition of such authority, has been content to pass it over under the general description of *merè spiritualia*, or of crimes for which the punishment of penance used to be inflicted (i). It is true, that of late years the legislature had been induced to point out certain new sectaries as objects of particular animadversion; but they at

(a) Vide Goodall, &c.

(b) 44 Ass. 8.

(c) Vid. ant. vol. I. 434.

(d) Fitz. proh. 96.

(e) 22 Hen. VI. 52.

(f) Vid. ant. vol. II. 216.

(g) Reg. 45. 48.

(h) F. N. B. Consult.

(i) Vid. ant. vol. II. 216.

the same time fully recognised the former authority of the bishops (a).

Perjury in an ecclesiastical cause, or matter, was an offence properly cognisable in this court. Under the title of perjury we come to consider the breach of a voluntary oath, whether taken privately, or publicly before an ecclesiastical judge, as was common in these days. This has been frequently before mentioned, under the term of *lesio fidei*, as a disputed object of clerical judicature. The same doubt seems still to have continued; for upon comparison of some cases, in this and the foregoing reigns, there is a contrariety that stands in need of some distinction to reconcile it. In the case of the vicar of Saltash, who had made an obligation, and had bound himself to the observance of it, by oath taken before the pope's collector, it was declared by *Hankford* justice, that no one should be sued before the ordinary for perjury, but where the principal matter on which the perjury arose was of a spiritual nature; for if it was otherwise, he might in that manner be compelled to perform lay contracts, which belonged only to the temporal courts (b). A few years after, it was likewise held, that where a man had sworn to make a feoffment, he should not, for the above reason, be sued for breach of his oath in the clerical court (c). These cases happened in the reign of Henry IV. and the spirit of them was maintained in some opinions delivered in the two present reigns. In 38 Hen. VI. the same law was laid down by *Fortescue*, in the exchequer-chamber, and was admitted by some others of the judges, and denied by none (d). Again, in 20 Ed. IV. it was declared by *Brian*, that where faith was made concerning a spiritual matter, as to pay tithes or to marry, the breach thereof should be punished in the spiritual court; but not if it was upon a

(a) Stat. 2 Hen. IV. c. 15, and 2 Hen. V. c. 7. Vid. ant. vol. III. 235. 260.
 (b) 2 Hen. IV. 15. Bro. Praem. 16. (c) 11 Hen. IV. 88. (d) 38 Hen. VI. 29.

temporal matter (a). Again, in 22 Ed. IV. where an oath had been made for the payment of money, the same opinion was delivered; but the reason then given by *Brian* is, because an action would lie for the money at common law (b). These opinions seem only to confirm what had long since been delivered by *Bracton* (c).

But notwithstanding these declarations of the judges, it is beyond question, that the courts ecclesiastical did *de facto* hold plea of breach of oath and of faith falsified, or *de fidei læsione*, as it was termed (which was considered by the canonists, in some respects, as the breach of a corporal oath) even when such oath or faith, voluntarily taken, was for confirming of a matter temporal: and this appears not only from the testimony of canonists, but from decisions in our courts of common law. It must be recollected, how positively this object of jurisdiction is asserted by the constitution of Boniface, in the reign of Henry III. in which it is claimed absolutely, without any distinction whether the cause was spiritual or temporal (d), provided there was no mention of chattels. Such matters are also admitted to belong to the clerical judicature, by the statute *circumspectè agatis*, provided money was not demanded (e). Conformably with this last idea, it was held, in the time of Edward III. that though the ordinary, in such cases, could not enjoin the party to pay the debt according to his oath, yet he might enjoin him corporal penance (f); which opinion was confirmed by one in the 34 Henry VI. when it was held, that where a man bought a horse, and swore upon the Evangelists to pay 10*l.* for it by such a day, if he broke his faith, an action of debt might be had at common law, and also a suit *pro læsione fidei* in the spiritual court: and it was said, this would be no prejudice to the spiritual court, because the two proceedings were

(a) 20 Ed. IV. 10.

(b) 22 Ed. IV. 20.

(c) Vid. ant. vol. I. 455.

(d) Vid. ant. vol. II. 79.

(e) Vid. ant. vol. II. 217.

(f) 22 Ass. 70.

Fitz. Prohib. 2.

for different objects (a). A new turn, however, was given to this doctrine by our courts of common law, in the latter end of Edward IV.; for it was then declared by *Brian* and *Littleton*, without any one contradicting them, that *in lésione fidei* arising upon a temporal matter, the spiritual court might punish *ex officio*, but not at the suit of the party. This latter opinion was adopted in the next reign (b), and is the latest opinion in our books of common law upon this famous question. It is thought the temporal judges required the proceeding to be *ex officio* rather than at the suit of a party, because it was presumed that the party would not prosecute merely for the punishment of the sin, but for pecuniary satisfaction for the injury (c).

Lyndwood, however, seems to entertain no such distinction, but speaks as if the proceeding might be either way; and he gives the form of a libel, which he thinks so drawn as not to be liable to a prohibition: this we shall give the reader at length, not only to illustrate the present point, but as a specimen, and the only one, of pleadings in this court. The form of the libel is as follows: *A. proponit in iudicio contra B. quòd idem B. FIDEI SUÆ INTERPOSITIONE (or juramento suo medio) promisit et se astringit dicto A. decem libras tali die fideliter soluturum; quia tamen fidem, (or juramentum) idem B. dicto die adveniente promissum suum hujusmodi non servando, sed contra illud temerè veniendo damnabiliter violavit, minus canonicè præstendens se dictæ fidei suæ (or jûramenti) interpositione hujusmodi vinculo non ligari, cùm re verâ fidei interpositio (or juramentum) hujusmodi ipsum ad præmissa fideliter servanda, secundum jus divinum, et instituta canonica, sub pænâ peccati mortalis effectualiter astringeret, et astringat. Quare factâ fide, quæ requiritur in hac parte, petit pars dicti A. per vos dominum judicem antedictum pronunciari, de-*

(a) 34 Hen. VI. 70. (b) 12 Hen. VII. 22. (c) See An Apologie, &c. Part I. 48 to 52.

cerni, et declarari supradictum. B. prefatæ suæ fidei interpositione (or juramenti vinculo) ad servandum et implendum promissa de jure divino, et juxta canonica instituta effectualiter, et sub pœnâ peccati mortalis astrictum et ligatum fuisse, et esse, nec non eundem B. fidem suam (or juramentum) hujusmodi temerè violasse, ac pro violatione ipsâ canonicè puniendum fore, et puniri debere (a).

Thus far of offences of the first class; next as to those of the second, concerning which there is abundance of common-law testimonies. As to usury, we find it declared by stat. 15 Ed. III. c. 5. that the king should have confiscance of usurers dead, and the ordinaries of such as were alive. This divided empire was noticed before from Glanville (b).

Notwithstanding defamation is mentioned in the statutes of *circumspectè agatis* and *articuli cleri* as an object of spiritual cognisance, without adding any qualification as to the nature of the defamation (c), yet an exception had been lately introduced, similar to that which governed in many other points of disputed jurisdiction. It seems, from the tenor of *Hankford's* argument in the case of the vicar of Saltash, before quoted, that if the defamation arose on a temporal cause, it was held not to be cognisable in the ecclesiastical court (d). So in the reign of Edward IV. it was said, that where a person charged another with a robbery, the party diffamed could not sue in the spiritual court, because he might have an action at common law; and where an action of trespass was brought for goods taken, and the defendant sued in the spiritual court for defamation, a prohibition was granted (e). There is also in the Register a prohibition to a suit for defamation, where a person had been a witness on an inquisition taken for the king, and the party affected revenged himself in

(a) Lynd. 315. o.
217. 391.

(b) Vid. ant. vol. I. 119.
(d) 2 Hen. IV. 15.

(c) Vid. ant. vol. II.
(e) 19 Ed. IV. 6.

this manner for the loss he thereby was likely to sustain (a). We have seen, that a statute was made in the reign of Edward III. declaring, that a prohibition should go to all suits for defamation against indictors (b).

The laying of violent hands on a clerk, was an offence that was expressly assigned to the cognisance of the spiritual court, by the statutes of *circumspecte agatis* and of *articuli cleri* (c); and it now rested entirely upon the distinction there laid down; for it was held, in 22 Ed. IV. that if a man beat a clerk, and he sued him in this court for his sin of excommunication, he did well; but if he sued there for amends, a prohibition would lie (d). That sacrilege was both a spiritual and temporal crime, appears by some cases at common law of a very early date; where it is laid down, that in case of goods stolen out of a church or church-yard, the owner might sue for them in this court: the same of trees growing in a church-yard (e). According to Lyndwood, this was now deemed both a spiritual and temporal crime (f). Dilapidations were an object of spiritual censure; for in the time of Henry IV. it was held by *Tirwhit*, that if an ecclesiastical person made waste of a benefice, he should be deposed as a dilapidator of his church; and deposition was an act of the spiritual judge (g). We have the authority of Lyndwood for saying that incest, whoredom, and any incontinence, simony, usury, heresy, perjury, witchcraft, fortune-telling, drunkenness, and the like disorders and immoralities were crimes punishable in the spiritual court (h).

Ecclesiastical courts. Such was the mode of proceeding, and such were the objects of jurisdiction in our ecclesiastical courts. It is next to be seen what courts these were, and who presided in them. This, after what has already been said, need not detain us long. An

(a) Reg. 42.

(b) Vid. ant. vol. II. 459. Vid. An Apologie, &c. 56.

(c) Vid. ant. vol. II. 215. 292.

(d) 22 Ed. IV.

(e) 4 Hen. III. and

17 Hen. III. Fitz. Prohib. 14. 26.

(f) Lynd. 315. q.

(g) 2 Hen. IV. 9.

(h) Lynd. 96. o.

English bishop, consistent with the scheme we have just given from the canon law (a), had spiritual jurisdiction through his whole diocese. The person who executed all of this charge which did not belong to the bishop by reason of his order, was called a chancellor; though it is remarkable that he is not so named in any of the commissions he holds, nor executes the proper duty of a chancellor. In early times, it is said that bishops had such an officer, who kept their seals. The chancellor of a bishop in this country usually holds two offices, that of *vicar-general*, and that of *official principal*; both which have been mentioned as appointments known to the canon law (b). The first was to exercise jurisdiction purely spiritual; as visitation, correction of manners, granting institution, and a general inspection and superintendence of things for the preservation of discipline and good government in the church. The business of the latter (in which we are more particularly interested) was to hear causes. Though these two offices have been usually granted together, yet there are instances of vicars-general being appointed separately, upon occasional absence of the bishop; which, indeed, was the original design of such an establishment.

The authority of a chancellor, like that of his bishop, is generally given so fully as to extend over the whole diocese to all matters and causes ecclesiastical. But a bishop might create some exceptions to this general jurisdiction, by giving a limited one to a *commissary*. A commissary's authority was restricted to certain places, and to certain causes. These officers correspond with what the canonists called *officiales foranei* (c), as if restrained *cujdam foro* only of the diocese. Another exception to the jurisdiction of the chancellor was that of an archdeacon. In some archdeaconries, partly by grants from the bishop, and partly by custom, the archdeacon exercises both spiritual and ju-

(a) Vid. ant. 4.

(b) Vid. ant. 5, 6.

(c) Vid. ant. 6.

dicial authority; and this, as to causes and things, is of more or less extent in different places; and in some is peculiar and exempt from the bishop, in others only concurrent. But this limited jurisdiction of the archdeacon differs from that of the commissary, and also of the chancellor, inasmuch as he does not receive it by delegation, but has it *jure ordinario*, as ordinary; and where he does not preside himself, he appoints an official, who, from his restriction to certain places and causes, may be resembled to the commissary of the bishop. The title given to all spiritual courts was that of consistory.

Thus there was in every diocese a court held before the official principal of the bishop; and in some there was also one held by the bishop's commissary, and by the official of some archdeacon. Besides these, there were courts of the archbishops who had two jurisdictions; one diocesan, like the other bishops; the other was a superintendence over the bishops of their respective provinces. The archbishop of Canterbury was considered as *legatus natus* in England (a). He had five courts; the court of arches, two courts of peculiars, the court of audience, and the prerogative court. The former was usually held in Bow church, called *ecclesia sanctæ Mariæ de arcubus*; and so from the church this court was called *curia de arcubus*; and it was held by the official principal of the archbishop, called *officialis de arcubus*. The court of peculiars was held by the dean of the peculiars, having jurisdiction over the thirteen parishes called the peculiars of the archbishop in London; the dean used also to hold his court in Bow church. The other court of peculiars was held by the same person by the title of *judge of the peculiars*, and he had jurisdiction over fifty-seven parishes lying in different dioceses, and not subject to the bishop or archdeacon, but to the archbishop. The court of audience used to be held in the archbishop's palace

(a) Vid. ant. §.

before auditors, who heard such matters, whether of contentions, or voluntary jurisdiction, as the archbishop thought fit to reserve for his own determination: they prepared evidence and other materials to lay before the archbishop for his decision. This was afterwards removed from the archbishop's palace, and the jurisdiction of it exercised by the *master*, or *official of the audience*, who held his court in the consistory place at St. Paul's. The great offices of official principal of the archbishop, dean, or judge of the peculiars, and official of the audience, have since been united in one person, under the general name of dean of the arches, who is also vicar-general of the archbishop (a). These courts are at present all held in Doctors Commons, as is also the prerogative court by the judge of the prerogative court. This court was for the cognisance of all wills, where, the testator having *bona notabilia*, the proof and administration, according to Lyndwood, belonged to the archbishop by a special prerogative (b). The *curia de arcibus* was known under that name long before the reign of Henry II.

All suits were to be commenced in the court of the official principal of the diocese, unless the place where the cause of suit arose was within a peculiar and exempt jurisdiction, whether of an archdeacon, or the archbishop; and then before the official of the former, or the dean or judge of the peculiars of the latter, as the case might be. There lay an appeal from the archdeacon or his official to the bishop, that is, to his official principal; and from the official principal of the bishop to the archbishop, that is, to his official principal; for the consistory of the official principal being in effect only the court of the bishop, the appeal, if to him, would be *ab eodem ad eundem*. From the archbishop the regular course of appeal was to the pope. No appeal could be carried *per saltum* from the archdeacon

(a) Johns. 254, 257. Gibs. 1004.

(b) Vid. ant. 77.

to the archbishop; though a rule of the canon law, as we have seen, allowed such premature appeal to the pope in any stage of the proceeding (a).

Such were the ecclesiastical courts, and such their dependence on, and relation to, each other. Such they still continue, with very little alteration, except in the point of papal revision and controul, which was taken away in the reign of Henry VIII.

Prohibitions. The common-law jurisdiction, by which the spiritual court was controuled and circumscribed, seemed of late to be enlarging its powers of attack; for prohibitions, which hitherto had been confined to the chancery and king's bench, were now held by all the judges of the common pleas, upon view of former precedents, to belong also to that court. But they made the following distinction between this court and the others; that in this there must always be an original writ depending for the same matter, otherwise they had no authority to prohibit: instead, therefore, of granting a prohibition, as the king's bench, in the first instance, the course was to get an original writ of prohibition out of chancery, returnable in the common pleas, commanding the justices to make attachment. It was on the same occasion agreed, that the common pleas had authority, in the like manner, to grant writs of consultation (b).

Provincial constitutions. The reader has been detained so long with the detail of the juridical system which prevailed in our ecclesiastical courts at this time, that he will probably be content with a slight notice of what was done by the clerical legislature. Our attention has not been drawn to the transactions of the provincial synods, since we mentioned the constitutions of archbishops Peckham and Winchelsey, in the reign of Edward I. From that period down to the present, the archbishops of Canterbury had held many

(a) Gibs. 1036.

(b) 38 Hen. VI. 14.

provincial synods, and made various constitutions therein. In 1322 a synod was held, and constitutions made by Walter Reynolds; in 1328, 1330, 1332, by Simon Mepham; in 1342, and 1343, by John Stratford; in 1351, 1359, and 1362, by Simon Islep; in 1367, by Simon Langham; in 1378, by Simon Sudbury; in 1391, by William Courtney; in 1398, by Roger Walden; in 1408, by Thomas Arundel; in 1415, 1416, 1430, 1434, and 1439, by Henry Chichley; in 1445, by John Stafford. While the province of Canterbury was thus regulated by the care and industry of successive prelates, there appear no provisions made for the like purpose by the archbishops of the other province, except the constitutions of William de la Zouche in 1350; those of John Thorsby in 1363, which were partly a republication of those of the former prelate; and those of John Kemp in 1444, which were partly transcribed from some of Winchelsey's in 1305. This seemed a defect in the clerical polity; to remedy which, and to reduce the order, discipline, and judicature of the national church to some uniformity, it was provided in 1462, in a convocation of the clergy of York, held by William Booth, that the effect of the constitutions of the province of Canterbury, had, and observed, and being no wise repugnant or prejudicial to those of York, should be admitted into that province, but not otherwise, nor in any other manner; and for that purpose should be inserted and incorporated with them (a). Thus was a body of national canons collected for the observance of the whole kingdom. As matters of discipline were firmly settled according to the Romish scheme, and the principal opposition to it, which had been raised by Wickliff's followers, was now silenced, the convocations had little of moment to engage their attention; and we accordingly find nothing of importance added to the above body of constitutions. The whole of these, from the time of

(a) Johnson's Canons, vol. II. 1463.

Lanfranc as far down as 1430, were digested and commented on by Lyndwood, and in that form presented a valuable depository of English ecclesiastical law.

The king and
government.

There is no mention that the first of the kings whose reigns we have now been reviewing, took any personal concern in providing for the improvement of our law, or shewed any remarkable regard for it. The following facts related of Edward IV. place him in a different light. It is said by the writer of the History of Crowland Abbey, that this king went in person with the judges to try criminals in different parts of the kingdom; *nemini, etiamsi domestico suo, parcens, quod minus laqueo penderet, si in furto vel latrocinio deprehensus fuerit* (a). We are told also, that in the second year of his reign he sat three days together, in Michaelmas term, in the court of king's bench; to which attendance he was excited by a strong desire, it is said, to understand the law (b).

Upon the whole, the law was left to itself to maintain its ground as it could, amidst the convulsions which the nation underwent during great part of this period. During the reign of Richard II. the dignity of the law, together with the honour of the kingdom, through the weakness of that prince, and the difficulties occurring in his government, seemed somewhat to decline (c). When the law had taken this unfavourable turn, it required every encouragement from the settled state of things in the reigns of Henry IV. and V. to recover itself. This it effectually did; and having gathered strength, it began to flourish in a manner which enabled it to withstand all shocks from the political world. In the latter part of the reign of Henry VI. while the nation was in arms, and the throne was overturned by successive revolutions, the courts of law enjoyed an entire peace; and justice was administered with a precision,

(a) Gale, vol. I. 559. Bar. Stat. 419.
184. Bar. Stat. 429.

(b) Truss. Cont. of Dan.
(c) Hale's Hist. 174.

learning, and effect, that was not surpassed in any times before or since. Both these reigns abounded with eminent lawyers.

Edward IV. with all his regard to the laws, was guilty of straining the construction of them to gratify his resentments. It is a common story of this king, that having killed a favourite deer of a Mr. Burdet, of Arrow in Warwickshire, that gentleman vented his resentment by wishing the horns of the deer in the belly of the man who had advised the king to that insult upon him; for which the king ordered him to be prosecuted as for treason, and that unhappy gentleman was beheaded. This man is said by others to have been prosecuted (no doubt under a fictitious charge) for poisoning, sorcery, and enchantment (*a*), and that he was attainted by parliament. These supernatural gifts were considered as common, and the supposed exercise of them was punished as a very heinous offence in those times: one John Stacy was executed for a charge of that kind in this reign.

Richard II. raised money upon the subject without consent of parliament; a stretch of prerogative which neither Henry IV. V. nor VI. ever attempted. It is remarked of the house of Lancaster, that its princes always paid a regard to the rights of the people; a policy to which they adhered probably to avoid exciting any spirit to question their title to the throne. This temper in the crown contributed to raise the house of commons into great consideration during these reigns: they became more jealous of their rank in the state than ever, and particularly on this subject of taxation. It is to be attributed to this, that when Edward IV. invented a new method of raising money without assent of parliament, it was thought prudent to give it the gentle name of a *benevolence*.

There happened in 31 Hen. VI. a fact which greatly infringed the privileges of this rising part of the legisla-

ture. Their speaker, *Thomas Thorpe*, was taken in execution in an action of trespass *de bonis asportatis*, at the suit of the duke of York, then president of the parliament. The commons made a representation of this to the king and lords, and they consulted the judges; who were of opinion, that if a member of parliament was arrested for any cause but treason, felony, or surety of the peace, or for a judgment had before parliament, it was usual for such person to be discharged from the arrest. But, notwithstanding this direct and express opinion, the lords came to a resolution, that the speaker should continue in custody, notwithstanding his privilege of member and speaker^(a). The commons acquiesced in this resolution, and chose another speaker in his place. This temper in the commons can only be accounted for from the prevailing prejudice in favour of that great pretender to the throne.

There seems to be the same irregularity in criminal proceedings as in the former periods. Even in a time of tranquillity, and under the administration of the good duke of Gloucester, in the reign of Henry VI. a state-criminal was sentenced without any trial. Sir John Mortimer had been committed to prison, and having escaped was indicted for that escape: the indictment was removed into the house of lords, where he was adjudged guilty, and was executed. However, here had been an examination by the jury at least who found the bill; and we have seen that, in the early ages of our law, that was the utmost which a prisoner was entitled to^(b).

In 27 Henry VI. we find a very singular proceeding against the duke of Suffolk. This nobleman was impeached by the commons. The duke upon his knees denied the whole charge before the lords. At length the king sent for all the lords spiritual and temporal then in town to his chamber. There the chancellor put the question to the

(a) Cotton, 651. Parl. Hist. vol. II. 287.

(b) Vid. ant. vol. II. 31, 32.

duke, which way he would be tried : to this the duke answered by referring to his former denial of the charge ; and, protesting his innocence, put himself entirely on the king's mercy and award. Then the chancellor, by the king's command, pronounced this sentence : " That since " the duke did not put himself on his peerage, the king as " to the articles of treason was doubtful ; and as to the " articles of misprision, the king, *not as judge by the advice of the lords*, but as one to whose order the duke had " submitted himself, did banish him the realm and other his " dominions for five years." After this, the lord high-constable stood up on behalf of the bishops and lords, and required it to be enrolled, that the said judgment was by the king's own rule, and not by their assent ; and also required, that neither they nor their heirs should by this example be barred of their peerage and privileges (a).

The memorials of the law during this period ^{The statutes.} consist in the statutes, rolls of parliament, the year-books, and some law-treatises. Many inconveniences still arose from the ancient method of making the statutes from the petition and answer on the parliament-roll. To remedy these, about the end of the reign of Henry VI. or beginning of Edward IV. the practice was introduced of putting the provisions intended to be made, into the full and complete form of an act of parliament, in the first instance ; which was the identical instrument that received the king's assent. To this they used to prefix this title : *Item quedam petitio exhibita fuit in hoc parlamento FORMAM ACTUS in se continens* ; a title which imported in the terms of it a remembrance of the ancient method of preferring a petition. This title is now disused ; but, excepting that circumstance, this is the present way of passing acts of parliament. The language of the statutes during the reigns of Henry VI. and Edward IV. was sometimes English, but more usually French.

(a) Parl. Hist. vol. II. 273.

Reports.

Of the year-books of Henry VI. and his successors it may be said, that both the matter and style of them are more suited to the reading of a modern lawyer than any of the former ; so that they are much more worthy of notice than those of the preceding reigns. They contain a fuller account of what passed in court ; questions of law are more thoroughly debated, and the opinions of the judges given more at length. The second part of Henry VI. and the whole of Edward IV. particularly the long *Quint*, as it is called, are full of excellent learning. The first part of Henry VI. is pronounced by a great lawyer to be more barren, spending itself in much learning of little moment, and long since out of use (a).

The other productions of the lawyers of this period which have come down to us, are some law-treatises. One of these is Fortescue's book *De Laudibus Legum Angliæ* ; the other is Littleton's *Tenures* ; to which may be added *Statham's* Abridgment.

Fortescue.

Sir John Fortescue, who had been some time chief-justice of the king's bench, is said to have written this work, *De Laudibus Legum Angliæ*, while he was enduring an exile with the prince of Wales, and others of the Lancastrian party, in France. Sir John was then made chancellor ; and in that character he supposes himself holding a conversation with the young prince on the nature and excellence of the laws of England compared with the civil law, and the laws of other countries. He considers at length the mode of trying matters of fact by jury, and shews how it excels that by witnesses. He informs us, that some of our princes wished to introduce the civil law merely for the sake of governing (b) in the arbitrary way allowed by that law, which declares, *quod principi placuit, legis habet vigorem*. He then proceeds to examine some other points of difference between the civil and common law,

(a) Hale's Hist. 176.

(b) Chap. 34, 35, 36.

always deciding in favour of our own, particularly in the following instances: the bastardizing the issue born before wedlock (a), *partus non sequitur ventrem*, SED SEQUITUR PATREM; guardianship committed to those who could not by law succeed to the inheritance (b); and in the punishment of theft no regard paid to a distinction between *furtum manifestum* & *non manifestum* (c). He concludes his book with a short account of the societies where the law of England was studied, the degrees and ranks in the profession (d), with the manner in which they were conferred: to these are subjoined some short remarks on the conduct and delay of suits.

This treatise seems to be intended as an introduction to some more particular work on the English law; the object of it being rather to take off the discredit which some civilians had endeavoured to throw on it, and to promote a more general acquaintance with it among persons who did not study it professionally. It is written in a tolerable Latin, and displays sentiments upon liberty and limited government, which one would hardly expect to find in a writer of this period. There runs through the whole an air of probity and piety, that conciliates the attention of the reader, in spite of the many scraps quoted from the Fathers, which are interspersed profusely, and often very much out of season. This is the principal work of our author, to whom we are indebted for some others of less note.

Littleton was a judge of the common-pleas in the reign of Edward IV. and composed his book of *Tenures* for the use of his son, to whom it is addressed. It contains three books; the first, upon estates; the second, upon tenures and services; which two were designed to explain more at large the principal subject of the old book of tenures: the third discourses of several incidents and

Littleton.

(a) Chap. 40. (b) Chap. 44. (c) Chap. 48. (d) Chap. 42, 43, 44.

consequences of tenures and estates. This little treatise has acquired more notice than any other book in the law; which is to be ascribed partly to the nature of the subject, partly to the manner in which it is treated, and partly to the great character of the writer when a judge.

The learning of real property had in the reign of Edward III. been cultivated with a minute attention: the period which had elapsed from that reign to the time when our author wrote, had produced many additions and modifications of it, till this branch had grown into a very refined system, constituting, in every respect, the most intricate part of our jurisprudence. These later determinations had rendered the old treatises of the law in a great degree obsolete. Bracton, though more full than any of the rest, being more ancient, afforded no light in that sort of questions which were now usually canvassed, and many of which had originated intirely since his time: still less was to be expected from Fleta, Britton, and The Mirvoir, though of a later age. In this state of things, it was an undertaking much to be wished, that some one should explain in a methodical way the new learning that had arisen on the subject of tenures and estates. This our author has done, with a felicity which has placed him in a rank above all writers on the English law.

If we enquire what is the excellence which has entitled this writer to so high a character, it will be found to be of a particular kind. It is not an accurate arrangement of his subject; not a remarkably apt division of his matter; not a strict adherence even to his own plan, by preserving a close connection between the matter and title of a chapter; in all which he is sometimes more defective than writers of inferior note: the excellence of Littleton seems to consist in the great depth of his learning, and simplicity of his manner; in a comprehensive way of thinking, and a happy method of explaining; with a certain plainness yet significance of style, that is always clear and expressive.

This author usually quotes no authority for his own opinions. In this, however, he does not differ from his cotemporaries, who even in their arguments and opinions delivered in court, had not got into that practice of vouching authorities which has obtained so much since. Whenever he has a point to handle which is not thoroughly settled, he generally states the different opinions on it, and then gives his own reasons for differing or agreeing with either: and where he does not deliver an opinion declaredly his own, the last is supposed to be that which he is inclined to adopt. This open and candid way of discussing, added to the known abilities of the author, acquired him great confidence with posterity: any thing out of Littleton has been usually taken upon that authority alone. Thus, the want of references, which at first might seem a want of authenticity, has in the end administered to the fame of this writer; as opinions which otherwise might be vouched from an adjudged case, are now wholly rested on the words of Littleton.

The undiminished reputation which this author still possesses, is owing principally to the choice of his subject. The law of tenures and estates, as understood in the time of Littleton, is at this day the best introduction to the knowledge of real property; and though great part of this volume is not now law, yet so intimately was the whole of that system connected, that what remains of tenures cannot be understood without a knowledge of what is abolished; and therefore the parts of Littleton which are now obsolete, are studied both with profit and pleasure. We may still say what the author pronounced of his work in another respect: "Though certain things which are moved and specified in the said book, are not altogether law, yet such things shall make thee more apt and able to understand and apprehend the arguments and reasons of the law (a).

(a) Litt. Epilog.

Beside this, the law of tenures and estates has always been thought the most natural entrance into the study of the law in general; this small volume, therefore, became the first book which was put into the hands of the student; and while it was considered by practicers and the courts as a work of the highest authority, it was at the same time the institute to English jurisprudence. Lawyers gave their earliest and latest application to the text of Littleton: every section and sentence was weighed, and every proposition considered in all its consequences; it was translated, commented, analysed; every method was contrived to gain a complete knowledge of its contents. Perhaps no book, in any science so confined as the municipal laws of any country must be, has more employed the labours of the learned and industrious. A writer, who was himself one of the greatest ornaments of the law, and whose name never appears greater than when accompanied with that of our author, furnished the world with a very copious and minute commentary on this book; in which he has carried his attention to the import of every word so far, as to make interesting remarks on his very *et ceteras*. The fame of Littleton has not been confined to this island. As the Norman lawyers made Glanville a model upon which to form their *coutumier*, and give system to their jurisprudence, a modern writer of that country has lately composed a comment on Littleton, as the best help towards illustrating the customs and laws of that Duchy (a).

(a) This commentator is M. Howard, advocate of the parliament of Normandy, whose edition of our older law tracts we have had occasion to consider in another place. Vid. ant. vol. II. 283. in the notes. It is unnecessary to add any thing to what we there threw out with regard to this gentleman's qualifications to compose commentaries upon our laws. Upon the whole we are obliged to this foreigner; for if no English lawyer would write such observations upon Littleton, none would be at the pains to give us a new edition of Fleta, Britton, and the Mirror, with emendations of the numberless errors in their texts. The latter work will always be of use to the common lawyer, and the former is such as will never mislead him.

The learning of the law was thrown into a scholastical form than it had ever yet received; who was a baron of the exchequer in the time of Edward IV. This was in his *Abridgment of the Law*; being a kind of digest, containing most titles of the law, arranged in alphabetical order, and comprising under each head adjudged cases, abridged from the year-books in a concise manner. The plan of this work was entirely new, and conceived with some judgment, though the execution was imperfect, and left open to improvement. The cases are strung together with reference to nothing but the time of their adjudication, without any regard to the connexion of their matter. With all its incompleteness, this must have been a very valuable work at the time it was compiled, when the helps to the law were few and confined. This Abridgment has served as a model to others in later times; which, without the merit of originality, have surpassed their master's performance in method, precision, and extent. This work had the fate to be of less use than, perhaps, any performance that, in the nature of it, seemed to aim at such general utility. It is very doubtful whether it was printed before Fitzherbert's Abridgment, which came out in 1514; and whether it was printed a little before or a little after, the need of it was intirely superseded by the latter work.

Somewhat prior to these, a work of a more extensive, certainly of a much more difficult and laborious, nature was produced on the subject of our ecclesiastical law. This was the *Provinciale* of William Lyndwode, official principal to archbishop Chicheley. The learned canonist has here digested under heads the substance of almost every constitution made in synods of the province of Canterbury, from the time of Stephen Langton down to archbishop Chicheley. The method he has taken is that of the decretals of Pope Gregory IX. so justly esteemed the most systematic and valuable part of the canon law.

To this digest he has added a very copious and minute comment, replete with every illustration that could be furnished from an intimate acquaintance with the writings of foreign canonists, and a long experience in our own ecclesiastical courts. The comprehensiveness of this, as well as the merit of its execution, has contributed to place Lyndwode much above his predecessor *John de Altona*, who had led the way in this walk of study, by his gloss on the legatine constitutions of Otto and Ottoboni. With this distinction in favour of Lyndwode, these two writers have obtained great authority with posterity: they are regarded both in the spiritual and temporal courts, as containing undeniable evidence of the practice and law of their respective periods; and as they were instrumental in fixing both in after-times, their works are considered as the depositories of the common law of the church and of the ecclesiastical courts.

Lyndwode, in following the arrangement of the decretals, has been thought to sacrifice perspicuity to method, for that the matter of our constitutions does not fall easily into the order into which he has endeavoured to force them. His style of commenting likewise is not less liable to exception. Surely no one was so apprehensive as he appears, lest a word of his text should pass without being thoroughly understood (a). Every term has its comment; and rather than not say something, he too often indulges himself in unnecessary remarks and digressive details. This makes his gloss extremely minute and desultory; so that to read it at length is tedious, and to search for information on a particular point, is generally a fruitless labour. Notwithstanding these defects in Lyndwode, which too, perhaps, were the literary failings of the age in which he wrote, his labours have not been surpassed by any superior ability or industry in later times. The pages

(a) Gibs. Pref. 18.

of this old writer, and the still older whom we have just mentioned, continued for many years the only testimonies of our ecclesiastical law. To methodise or illustrate the existing materials, or add to them by making public reports of adjudged cases, are the two ways of promoting legal knowledge; in one of which the practicers in our ecclesiastical courts have done very little, and in the other nothing at all; so little did they improve the advantage given them by Lyndwode over the common-lawyers, who at that time had nothing of equal extent and utility on the practice of their courts (a).

The art of printing being introduced into Eng-
land by Caxton about the close of this period, we ^{Printing of} ^{law-books.}
are naturally led to enquire what use was made of it towards propagating a knowledge of our laws and constitution; but such has been the carelessness of that age, or the destruction of time, that nothing very authentic can be obtained on this subject. The first book known to be printed by Caxton, in England, was the *Recuyel of the Histories of Troy*, in 1471. While his press was employed in multiplying copies of Reynard the Fox, the Death of King Arthur, the History of Charles the Great, and other popular fables, and histories worse than fables, there is no proof that the profession of the law were indebted to him for one printed book. There is a copy of Lyndwode's Provinciale, which having Caxton's mark, and Wynkyn de Worde's colophon, was certainly printed by the latter. The statutes of Richard III. without name or date, though usually attributed to Caxton, are equally doubtful. The same may be said of the stat. 1, 2, and 3 Hen. VII. (b). The printers next in point of time were Lettou and Machlinia; who are supposed to have been Caxton's servants,

(a) This is said upon a supposition, that by the lapse of two hundred years, and the changes that had taken place in our law, Bracton had ceased to be of that use to practicers which he otherwise would have been.

(b) Typog. Antiq. p. 98. 101. 104.

and had begun to print for themselves in partnership, in the years 1480 and 1481. There is an edition of Littleton's Tenures printed by these printers, without a date: and this book is supposed to have been put to the press by the author himself, who died in 1481. There is a book intitled *Vieux Abrégement des Statutes*, which, from the types and marks, is supposed to have been printed at the same press and at the same time. These may therefore be considered as the first printers of law; though they had no patent or special authority for so doing. Some books are found with *Machlinia's* name singly, and others are thought to be his, from comparing the letter and work: of the former kind, is the year-book 34 Hen. VI.; of the latter is the 33d, 35th, and 36th years of the same king (a). To these may be added the statutes of the first year of Richard III. (b). About the same time some statutes were printed under the title of *Nova Statuta*, containing the statutes concerning the Despencers, those of Edward III. Richard II. Henry V. Henry VI. and those of Edward IV. down to the 22d year. All the foregoing books were in folio (c).

Miscellaneous facts. The flourishing state of the law during this period may be collected from a short account of the law-societies, and some circumstances relating to their members. We are told, that in the reign of Henry VI. there were ten lesser inns, which were called *inns of chancery*, each containing at least one hundred students, and some a great many more. These were designed as places for elementary studies: here they learned the nature of original and judicial writs, which were then considered as the first principles of the law; and for this reason these inns were denominated from the chancery. When young men had made some progress here, and were more advanced in years, then they were admitted into the *inns of court*. Of these there were four in number, which we have before men-

(a) Typog. Antiq. 111, 112, 113. (b) Ibid. (c) Ibid. 114, 115.

tioned in the reigns of Edward II. and III. (a). The least of these, it is said, contained two hundred students (b).

We are informed by a writer of this time, that a student could not reside in the inns of court for less than 28*l.* *per ann.* and proportionably more if he had a servant, as most of them had. For this reason, the students of the law were generally sons of persons of quality. Knights, barons, and the greatest nobility of the kingdom, often placed their children here, not so much to make the law, their study, as to form their manners, and preserve them from the contagion of vicious habits: for, says the same author, *all vice was there discountenanced and banished, and every thing good and virtuous was taught there; music, dancing, singing, history sacred and profane, and other accomplishments* (c).

The degree of serjeant at law was considered in a very respectable light: none could be a judge in the king's bench or common-pleas, but one who had been first a serjeant; nor was a person to be called to the degree of serjeant, till he had been in the general study of the law abovementioned at least for sixteen years, which probably meant from his first entrance at an inn of chancery. The ceremony and expence attending a call of serjeants was at this time very great: in general, about seven or eight were called at a time; and on that occasion, says our author, there were revels and feasting for seven days together, *as at a coronation*. The expence each serjeant was at seldom fell short of 260*l.* out of which one-sixth was usually expended on rings. Sir John Fortescue, to whom we are obliged for all this information, says, that it cost him 50*l.* in rings: we may conjecture from this what the profits of practice must have been (d). They were generally called the *king's serjeants*, because they were

(a) Vid. ant. vol. II. 359; and vol. III. 152. (b) Fortesc. de Land. c. 49.

(c) Ibid.

(d) Ibid. c. 50.

called to this honour by the king's writ; and they had a salary from the crown, as well as the king's attorney.

It seems that learned apprentices were not always ambitious of the state and degree of a serjeant; but, on the contrary, when called thereto, some of them had tried all ways to avoid it. There is an instance of this in the fifth year of Henry V. in John Martin, William Rabington, William Pole, William Westbury, John June, and Thomas Rolfe, six grave and famous apprentices, who having writs delivered to them to take the state and degree of serjeant, returnable in Michaelmas term, and having in vain tried all means of evading the direction of the writ, upon the return thereof in chancery made an absolute refusal. Upon this they were called before the parliament, that was then sitting, and there charged to take upon them the state and degree of serjeants, which at length they consented to do (a).

The king's attorney was the only law-officer of the crown of that kind till the reign of Edward IV. In the first year of that king we find *Richard Fowler* was made *solicitor* to the king (b), and in 11 Ed. IV. *William Husec* was appointed *attorney-general* in England (the first mention we have of this title), *attornatus generalis in Angliâ, cum potestate deputandi clericos ac officarios sub se in quâlibet cunctis curiâ de recordo* (c). This officer used to be appointed for life.

There were usually in the court of common-pleas five judges, sometimes six, but never more; in the king's bench there were sometimes four, sometimes five. It is said that they did not sit above three hours a day in court, and that was from eight in the morning to eleven. The courts were not open in the afternoon; but that time, says our author, was left unoccupied, for suitors to con-

(g) Rot. Parl. An. 5 Hen. V. 2 Inst. 24.

(b) Dugd. Chro. Series, 67.

(c) Ibid. 71.

sult with their counsel at home (a). The same writer speaks of the qualifications of a judge as not to be attained but *per viginti annorum lucubrationes*.

The salaries of the judges in the time of Henry IV. were as follow : The chief baron and other barons had 40 marks *per ann.*; the chief of the king's bench and of the common-pleas 40*l.* *per ann.*; the other justices in either court 40 marks. (b). But the gains of the practicers had become so great, that they could hardly be tempted to accept a place on the bench with such low salaries : therefore in 18 Hen. VI. the judges of all the courts at Westminster, together with the king's attorney and serjeants, exhibited a petition in parliament concerning the regular payment of their salaries, and perquisites of robes. The king assented to their request, and order was taken for increasing their income, which afterwards became larger, and more fixed : this consisted of a salary, and an allowance for robes. In 1 Ed. IV. Markham the chief justice of the king's bench had 170 marks *per ann.* pension, 5*l.* 6*s.* 6*d.* for his winter robes, and the same for his Whitsuntide robes ; *juxta formam* (says the record) *cujusdam actûs in parlamento* 18 Hen. VI. (c). Most of the judges had the honour of knighthood ; some of them were knights-banneret, and some had the order of the Bath (d).

The following is the state of the *Hospitia*, or Inns, for the residence of professors of the law in the time of Henry VI.

Part of Serjeant's Inn, in Chancery-lane, was inhabited by some serjeants in the time of Henry IV. when it was called *Faryndon's Inn* : the inheritance of it belonged to the bishops of Ely. In the reign of Henry V. the whole house was demised to the judges, and apprentices of the law, as appears by sums accounted for to the bishop. In 9 Henry VI. it obtained the name of *Hospitium*

(a) Fortesc. de Laud. c. 51. (b) Dugd. Orig. 105. (c) Ibid. 109.

(d) Ibid. 103.

Justitiariorum. In 2 Rich. III. there is a lease of it under the name of *Hospitium vocatum Serjeant's Inn*; this demise is at 4*l.* *per annum*. It appears in 21 Hen. VI. that the serjeants then, if not before, held Serjeant's Inn, in Fleet-street, under a demise from the dean and chapter of York, at the rent of 10 marks *per annum* (a). There was also *Scrope's Inn*, inhabited by serjeants, which was sometimes called Serjeant's Inn. This was an inn during the reign of Richard III. and was next to Ely-house, opposite St. Andrew's church, in Holborn (b).

The *inns of court* were the four which have already been mentioned (c). The ten *inns of chancery* in the reign of Henry VI. were the following: *Clifford's Inn*, which was an inn of chancery as early as the reign of Henry V. and had the sign of the black lion. *Clement's Inn* was a residence for students in the reign of Henry IV. if not before. *New Inn* had been a common inn for travellers, and, from the sign of the Virgin Mary, it was sometimes called Our Lady's Inn. This house was inhabited by the students who removed from an old inn of chancery, called *George's Inn*, near St. Sepulchre's church without Newgate. *The Strand Inn*, otherwise Chester Inn, from its neighbourhood to the bishop of Chester's house. This inn, together with the church of St. Mary le Strand, was pulled down in Edward the VIth's time, to make room for building Somerset-house. *Thavies Inn* we have seen was a residence for students in the reign of Edward III. It was granted in fee to the benchers of Lincoln's Inn in Edward the VIth's time. *Furnival's Inn*, which once belonged to the lords Furnival, was an inn of chancery in 9 Hen. IV. The students held it under a lease: in the time of Edward VI. the inheritance was in the then lord Shrewsbury, who sold it to the society of Lincoln's Inn, under whom the society of Furnival's Inn were afterwards

(a) Dugd. Orig. 326.

(b) Ibid.

(c) Vid. ant. 121.

tenants. *Staple Inn* was an inn of chancery in the time of Hen. V. The inheritance of it was granted in 20 Hen. VIII. to the society of Gray's Inn. *Barnard's Inn* was a law-society in the time of Henry VI. The tenth was perhaps *George's Inn* beforementioned.

These inns of chancery became all of them appendages to one or other of the inns of court: of these, seven only are now subsisting; Strand Inn being taken down in the reign of Edward VI.; George's Inn long before; and Thavies Inn within these few years.

CHAP. XXVI.

EDWARD V. RICHARD III.

*Cestui que use to make Estates—Benevolences abolished—
Bailing Felons by Justices—Fines—Private Acts.*

THE small space filled by these two kings did not pass without leaving some remembrances of it on our juridical polity. The transient reign of the first gave no time for calling a parliament, but the proceedings of the courts went on at their stated seasons, uninfluenced by the revolutions that now happened with a rapid succession in political affairs; and there have been handed down cases *de termino Trinitatis, anno primo Edward Quinti*.

His successor summoned a parliament in the first year of his reign, in which several acts were passed; and there are reports of two terms, Michaelmas in the first and Michaelmas in the second year of Richard III. In Richard's parliament some statutes of no small importance were enacted; that concerning *cestui que use* had an extensive effect on uses during the next reign, and great part of the succeeding; those about bailing and fines were thought such good regulations, that the policy of them was adopted in the next reign, and they were superseded by two improved statutes made for the same purpose. The statute against benevolences might be ranked with the statute *de tallagio non concedendo*, and other securities against levying money without parliament. We shall now consider these acts more particularly. The first three acts of this king were, first, for enabling *cestui que use* to dispose of the

land ; secondly, to relieve the subject from benevolences ; thirdly, for letting prisoners to bail.

We have seen the expedients which had already been resorted to for correcting the difficulties that followed from conveying land to a use (a). But the evil was still felt, and was complained of in the preamble of this act as existing in all its force. It was said, " that no man buying lands, tenements, rents, services, or other hereditaments, nor women who had jointures, or dowers, nor mens' last wills to be performed, nor leases for term of life or of years, nor annuities granted for term of life or otherwise, nor persons interested in any of these species of property, could be in safety, because of privy and unknown feoffments ;" the meaning of which was, that after a feoffment or gift was made by the apparent owner of the estate, it would turn out that he was only *cestui que use*, and therefore not enabled by law to do any act which could charge the freehold. It was therefore, to remedy this, now enacted, that every feoffment, estate, gift, grant, release, confirmation, and leases of lands, tenements, rents, services, or hereditaments, made by any person of full age and at large, and all recoveries and executions so had or made, should be good and effectual against the feoffor and his heirs, and those claiming any interest to their use. Thus was the *cestui que use* empowered to dispose of the estate, in the same manner as the *feoffee to the use* might at common law. It will soon be seen, that this new expedient to remedy the inconvenience of uses, only produced the additional confusion which must naturally follow when two persons had an equal right to dispose of the same land.

The second chapter of this act declares, that the *benevolences* heretofore enacted should not be drawn into example, but that exactions of that sort

(a) Vid. ant. vol. III. 275.

should no longer be levied. These *benevolentes* had been introduced by Edward IV. and the abolition of this mode of raising money was an attempt of Richard to conciliate to him the nobility and great men, who were the principal sufferers in these involuntary donations to the crown.

Bailing felons by justices. The third chapter of this act complains, that persons were daily arrested and imprisoned for felony, sometimes through malice, and sometimes on light suspicion, and so kept without bail or mainprise, to their great vexation and trouble. The old remedy in some of these cases was the writ *de odio et atia*; in others, they had no resource but the discretion of the sheriff, who acted under the authority of stat. Westm. 1 (a). To furnish persons so oppressed with a more speedy and easy redress, it was now provided, that every justice of the peace should have authority by his discretion to let such persons to bail or mainprise, in the same manner as if they had been indicted before the justices at the sessions. Power was also given to the justices to enquire in their session of the escapes of all persons arrested and imprisoned for felony. It was further enacted, that no sheriff, under-sheriff, escheator, bailiff, or other person should seize the goods of one who was arrested or imprisoned for felonies, before conviction or attainder, upon pain of forfeiting, to the person grieved, double the value of the things so taken; which regulation was in confirmation of the law of former times (b). The provision made by this statute about bailing, was re-considered in the next reign, when a new act was made.

Fines. Another remarkable provision made during the short reign of this king was the statute of fines, which like the preceding served as a model for another act in the next reign on the same subject. This statute is chap. 7. of Richard III. It refers to the statute *de finibus*; and, to increase the great security and confidence reposed

(a) Vid. ant. vol. II. 131.

(b) Vid. ant. vol. III. 141, and vol. II. 24.

in fines, it enacts, that, after the engrossing, every fine should be openly and solemnly read and proclaimed in court the same term, and the three next terms; during which ceremony all pleas should cease; and then a transcript should be sent from the justices to the justices of assise of the county where the lands lay, who were in like manner to cause it to be proclaimed in every one of their sessions that year; the same of the justices of the peace; which proclamations were to be certified the second return of the following term. After these proclamations and certificates, such fine was to conclude as well privies as strangers, except women covert not parties to the fine, persons within age, in prison, out of the realm, or not of whole memory; with a saving of the claims of all others having a title at the time of the fine being levied, so as they prosecuted their claim, by action or entry, in five years after the proclamation and certificate; and also saving the rights of those upon whom a title descended after the fine, provided they pursued their right in five years after such title came to them; or, if the persons were under any disabilities or defects, within five years after the removal thereof. The statute has a clause enabling persons to levy fines according to this act, or at the common law.

The other acts of this reign that are at all of a juridical nature, are the following: one was to declare that wherever the king was co-feoffee of lands to the use of the feoffor, the land should be in the co-feoffees; which was to prevent the conclusion of law that would give, in such case, the whole to the king (a): another required a certain qualification of property in jurors who served in the sheriff's tourn (b). The remaining acts related principally to trade and commerce.

The distinction between *private acts* (whose origin we have considered in the preceding period) (c) and *public*, was

(a) Ch. 5.

(b) Ch. 4.

(c) Vid. ant. vol. III. 379.

first made in the reign of Richard III. who applied this new invention to the purpose of destroying his enemies by parliamentary attainders. All Richard's statutes are in English; and so they continued to be drawn in all subsequent periods. When the parliament of Richard is considered in all these lights, it becomes an object of some note in juridical history.

CHAP. XXVII.

H E N R Y VII.

Attending the King in his Wars—Vagrants—Corporations—Statute of Fines—Statutes of Pernors of Profits—Alienations of Jointresses made void—Suits in Forma Pauperis—Attaints—Stealing Women—The Star Chamber new-modelled—Informations at the Assises and Sessions—Appeal of Murder—Bailing Felons by Justices of the Peace—Benefit of Clergy—Bargain and Sale—Of Uses—Covenants to stand seised—Ejectione Firmæ—Actions of Assumpsit—The Chancery—Of Treason—Larceny—Sanctuary—King and Government—Printing of Law-Books—Miscellaneous Facts.

THE reign of Henry VII. exhibits some remarkable instances of innovation upon the old law. The benefit of clergy was taken from offenders of a certain description; and regulations were made for qualifying that ancient exemption, so as to promote a better administration of criminal justice. Among the decisions of courts, there was one concerning the action of ejectment, which had the effect of bringing about a considerable change in the course of legal remedies for recovering land. These were perfectly novel, and gave rise to a new set of principles and ideas in the law of property and of crimes. Other productions of this reign, though only modifications of former establishments, are not less famous in the history of our jurisprudence: such is the statute of fines, and that for new-modelling the star-chamber. Many other points

of great importance attracted the notice of parliament, or were agitated in the courts, which make the reign of this king a period well worthy the attention of the historical student.

In reviewing the legal transactions of this reign, we shall begin with the statutes, as usual; first noticing those which relate to the king and the rights of persons, and then proceeding to those that affected the law of private rights. After the landing of Perkin Warbeck, in Kent, a law was made of a new impression. Apprehensive of the consequence of such attacks upon his title, Henry's friends prevailed on him to consent to some security for them, in case of changes: this was done by stat. 2 Hen. VII. c. 1. which ordains, that no person who, in arms or otherwise, assists the king for the time being, should afterwards be convicted or attainted thereof, as of an offence, by course of law, or by act of parliament; and all process and acts of parliament to the contrary are declared void. This act is said, by a learned and eminent writer (*a*), to be rather just than legal, and more magnanimous than provident. — It seems, however, to have been founded on principles of humanity and good sense,

Attending
the king in
his wars.

To throw a splendour round the crown, Henry had resolved, that all persons bearing any relation to the king should be about him in his expeditions; and we find two statutes made for this purpose; the first was stat. 11 Hen. VII. c. 18. which required all those who had any office, fee, or annuity, by grant from the crown (not having the king's licence to excuse, or any infirmity to prevent them), to attend the king in person when he went to war; and if they failed, all such grants were to be void. This was not to extend to any spiritual person, the master of the rolls, nor officers or clerks in chancery, or the justices of either bench; nor to the barons of the exchequer, or other officers of their courts; the king's attorney or

(*a*) Lord Bacon.

solicitor, or his serjeants at law. This point was pushed further a few years after by stat. 19 Hen. VII. c. 1. and extended to those occupying honours, castles, lordships, manors, lands, tenements, or other possessions and hereditaments of the grant of the crown; who were thought to be bound by a stronger duty than those of the former description. By this act such persons are intitled to the king's wages from their setting out to their return. The exceptions, in this latter act, were extended to the clerk of the king's council, to persons above sixty and under twenty-one years, and to cases where the patents mentioned the grant to be for a sum of money (*a*).

Particular privileges had before this been granted by parliament to persons in the king's service. Persons in the king's wages beyond or upon the sea, were not to be prejudiced by any descent, and might make their attorney to enter lands descended, or to attorn. Those with the king in his wars, might make feoffments to the use of their wills without licence; they were to have their own liveries, and they had authority to dispose of the wardship of their lands (*b*). While Henry was thus steady in exacting due attendance from the retainers of the crown, he was equally attentive to diminish the number of those of great lords. He was very strict in enforcing the statutes of liveries. The parliament added two more to the number of these regulations for lessening the influence and strength of the nobility in the country (*c*).

These were all the parliamentary provisions that seem to concern more particularly the king's person, and do not come under any of the heads under which the other acts of this reign will be arranged. Before we come to those on private rights, we shall briefly notice

(*a*) These laws cannot but bring to our recollection some former passages in our History. Vid. ant. vol. II. 104.

(*b*) Stat. 7 Hen. VII. c. 2, 3.

(*c*) Stat. 3 Hen. VII. c. 12. and stat. 19 Hen. VII. c. 14.

certain laws that were made for better regulating the lower orders of the community, and one that respects bodies politic and corporate.

Vagrants. It is probable that the cessation of the late civil contests had left many unemployed persons to become vagrants and infest the country; for we find two statutes for the correction of this evil, which seem to treat it with much severity. Vagabonds, idle and suspected persons, were to be set in the stocks three days and three nights, without any sustenance but bread and water; after which they were to be put out of the town. It was enjoined, that no one should give any thing else to such idle person, under the penalty of forfeiting a shilling. Poor persons not able to work were to resort to the hundred where they last dwelt, were best known, or were born, and there remain, under the penalty of being punished in the abovementioned way. To suppress the nurseries of idleness and beggary, it was provided, that no artificer, labourer or servant, should play at any unlawful games, except in Christmas. The common selling of ale might be checked by two justices of the peace (a). Several laws were made for the adjustment of trade and commerce, the employment of persons in agriculture, the building of houses of husbandry, the regulating of the wages of artificers, the apprenticing of boys, and other objects of an economical kind; but these were mostly experimental, and led to improvements of a more general nature, in the next and subsequent reigns (b).

That corporations might not carry the right they had to make by-laws too far, it was ordained, by stat. 19 Hen. VII. c. 7. that all acts and ordinances made by the wardens, masters, and fellowships of crafts and mysteries, and by rulers of guilds and fraternities, shall be

(a) Stat. 11 Hen. VII. c. 2. stat. 19 Hen. VII. c. 12. Vid. ant. vol. III. 169. 223.

(b) Stat. 11 Hen. VII. c. 22. stat. 4 Hen. VII. c. 19.

approved by the chancellor, treasurer, or chief justices of either bench, or three of them ; or by the justices of assize in their circuit ; and that otherwise they should be void. It was further ordained, that no by-law should be made to restrain suits in the king's courts.

The statutes made in this reign upon the subject of private rights related entirely to the modes and circumstances of alienation, whether in real or personal property. Of this nature were the statute of fines, those relating to the pernors of profits, and an act to prevent the alienations of jointresses. The only act respecting personalty which we shall have occasion to notice, is that for preventing gifts of goods in order to defraud creditors. The most remarkable regulation in this reign on the subject of real property is the statute of fines, 4 Hen. VII. c. 24. copied chiefly from that in the last reign. This act has been considered in two views ; either as intended to make a fine a bar to an entail, or to give to this ancient assurance the force and validity it possessed at common law before the statute of non-claim.

Those who are of the former opinion argue in this way: Notwithstanding, say they, the blow that was given to the statute *de donis* by the determination in *Taltarum's* case, the effects of entails were viewed with a jealous eye by this king. It should seem, something more was wished than this resolution to substantiate so bold and new a doctrine as that of barring entails, and virtually repealing an ancient statute, upon which the landed property of the kingdom had been settled for years. Henry saw that the consequence of a free power of alienation would be a gradual decline of the wealth and importance of the nobility, and a proportionate increase in that of the Crown : and knowing how much this concurred with his favourite scheme of aggrandizement, he procured the statute of fines to be passed.

Those who are of the latter opinion, deny that this statute was dictated by political reasons; and maintain, that considerations arising from the nature of a fine, as a common assurance of the realm, were the only motives for making it. By the statute of *modus levandi fines*, 18 Ed. I. claim must be made within a year after the fine levied by the person next immediately having right, without permission to those in the subsequent remainders to claim on his default; so that if there was tenant for life, remainder for life, remainder in fee, and the first tenant for life aliened, and the next remainder-man for life made no claim, the remainder-man in fee was without remedy. This mischief was one of the great causes of making stat. 34 Ed. III. c. 16 (a). by which non-claim was ousted; that is, a person's right was no longer barred by his not making his claim within the year. An example of this kind had been given by the statute *de donis*; the interest of the donor was there provided for by a clause much in the nature of this: it was ordained, that it should not be necessary for the heirs in tail, or for those in reversion, to put in claim. Great cause of the statute of non-claim was the interruption of foreign and domestic wars, which prevented people from attending to matters of property.

Whatever wisdom may be ascribed to the policy which dictated that statute, it was found that this doctrine of non-claim had very mischievous consequences. Fines, as they thus lay open to be questioned, became of less validity and effect, and were virtually very little more than feoffments of record. To remedy the endless contests and litigation to which estates were now exposed, and to restore fines to their former efficacy, were, as it should seem, the principal objects of stat. 4 Hen. VII. The makers of this act appear only to have pursued the

(a) Vid. ant. vol. II. 401.

reason of the common law, and to have intended merely to put fines into the same condition they were in before non-claim was ousted.

Such are the reasons and motives suggested by different persons for making this famous act. It must be confessed, that if there was any intention of giving to a fine the efficacy of barring an entail, the statute is couched in those covert and indirect terms which indicated an apprehension of some remaining prejudices in favour of entails; for, without any apparent reference to entails, or the declaration of the statute *de donis*, that fines, as against the issue, should be void, it enacts generally, "that fines of land levied with proclamation shall conclude *as well privies as strangers*." On the other hand, there is in the preamble mention made of the stat. 27 Ed. I. *de finibus*, and of the confusion introduced by the statute of non-claim, to remedy which it would intimate the present act was designed; and it was not till near forty years after, that a fine with proclamation was held to bar the issue, by construction of this act (a); and that was with such difference of opinion, that an act was purposely made some years after (b) to declare such a fine to be a bar to the issue. It may be added, that this act is only copied from one passed in the reign of Richard III. who had no leisure to devise schemes for impoverishing or humbling the nobility. This republication, therefore, can hardly be attributed to any personal design originating with the present king.

Fines levied according to this statute, and to have the effect here given them, were to be solemnly read and proclaimed in the three terms next following the ingrossing, at four days in every term, during which proclamation all pleas were to cease. There is a saving of the rights of such as might not be in a condition to vindicate their claims; such as *femes covert* (not being parties to the fine), persons

(a) 19 Hen. VIII. c.

(b) Stat. 32 Hen. VIII. c. 36.

If a bondman purchased any land or tenement, and made an estate to others to his use, the lord was enabled to enter, the same as if the bondman was seised of the land.

**Alienation of
jointresses
made void.**

There was another statute made concerning real property, which deserves notice. It was found necessary to remedy an abuse that had been practised by widows, while in possession of their dower, or of what has since been called a jointure. They were in this manner seised of the freehold, and consequently of all the privileges annexed to it; and could therefore exercise a right over it, which laid those next in succession quite at their mercy. To prevent this, it was enacted, by stat. 11 Hen. VII. c. 20. that if any woman, having an estate in dower, or for life, or in tail, jointly with her husband, or solely to herself, of the inheritance or purchase of her husband, or given by any of his ancestors; if a woman, having such estate, should, either when sole, or when married to a second husband, discontinue, alien, release, or confirm with warranty, or by covin suffer a recovery, it shall be void; and the person next intitled, after the woman's death, may enter and enjoy the land the same as if such woman was actually dead. There is a provision, that a woman may alien for her own life, and if the person next intitled agrees to it, she may alien for any greater estate. However, the widow was prevented from making a property of that which had been allotted to her for an honourable provision during life; and the reversion to the heirs of the husband and his family was effectually secured.

There is only one statute relating to the right of personal property, which much deserves our notice; that is, stat. 3 Hen. VII. c. 4. which was made to prevent the frauds committed on creditors by persons, who, having made deeds of gift of their effects, would fly to sanctuary and other privileged places, and there live upon their property, in defiance of those who had demands on them. It

was enacted by this statute, that all deeds of gift of goods and chattels in trust for and to the use of the person making them, shall be void.

We shall now speak of such statutes as made any alteration in the course of administering justice. These were not many ; but yet, together, contributed either to render the means of obtaining justice more ready, or delays less incommodious. They related to writs of error, popular actions, suits in *forma pauperis*, attaints, and the process in actions upon the case.

It was intended by stat. 3 Hen. VII. c. 10. to prevent a litigious stay of execution by writ of error. It ordains, if a defendant or tenant brings a writ of error, and the judgment be affirmed, or the writ be discontinued, or the plaintiff in error nonsuited, he shall pay costs and damages to the other party for the delay and wrongful vexation, by discretion of the court where the writ of error is depending.

The stat. 4 Hen. VII. c. 20. respecting popular actions, as it had a view to the emoluments of the exchequer, bore in it a striking mark of the genius of this reign. It had become the practice of government to enforce with rigour such penal laws as contributed to the increase of forfeitures and penalties ; and every thing which prevented the full effect of such laws, was to be removed. It was common for offenders to get a friendly action brought against them for the penalty they had incurred ; or if an adverse plaintiff had commenced a suit, they would get a friend to sue them, and by this collusion would confess a judgment to him, and plead that in bar of the other action. To prevent the effect of such practices, it was provided by this statute, that in the like cases the plaintiff may reply *covin*, and have judgment and execution as if no other action had been brought ; and where the collusion is proved on the defendant, he is to suffer imprisonment. It was further provided, that no release of any popular action by a private

person should be a bar to such action or indictment. Collusion was not to be replied, where the point of the action had been tried, and a verdict had.

Suits in formâ pauperis. Allowing persons to sue *in formâ pauperis*, as was done by stat. 11 Hen. VII. c. 12. was a humane constitution, and resembled more the legislation of an imaginary republic than the practice of actual governments. It was ordained, that every poor person should have original writs and writs of *subpœna* without paying for the sealing or writing thereof; and the chancellor was for that purpose to assign clerks, learned counsel, and attornies. If the writ was returnable before the justices of any court of record, they were also to assign counsel and attornies, to act without a fee. This indulgence may, however, be thought by some to be dangerous, and to need that caution and restriction which by a later act has been annexed to this privilege. To enable one to commence a litigation without expence, is tempting the resentments of men with too easy a gratification; and the defendant in such a suit is left in an unequal contest.

Attaints. Attaints, though in the nature of a criminal proceeding, may be mentioned in this place among the improvements made in civil process; as they were designed for the purpose of rendering the trial by jury as incorrupt and effectual as the nature of it would allow. It was now endeavoured to put attaints upon a different footing than they had been on before. Attaints had become very dilatory, lasting sometimes ten years^(*), and were attended with great expence, as well as impediment, in the conduct of them. These considerations, with that of the extreme rigour of the villainous judgment, induced persons rather to endure the injury they received from a false verdict, than be at the trouble of redressing themselves in this manner, or contribute towards inflicting so cruel a punishment.

(*) Stat. 11 Hen. VI. c. 4. Vid. ant. vol. III. 276.

As a substitute for the ancient severity, a new order of proceeding and another penalty was contrived by stat. 11 Henry VII. c. 24. which ordained a pecuniary mulct instead of the opprobrious judgment of the common-law. This statute being intended as an experiment, was temporary, and after several continuances of it in this reign, expired with it: in the next, a new one was made on the same subject (a). Another temporary law had been made at the same time against perjury, maintenance, embracery, and corruption of officers (b); crimes of the like nature with the corruption of jurors, and punished by numberless provisions in our early laws (c). A particular act was made to correct the evil of corrupt jurors in the city of London, who heretofore were not liable to an attain. It was provided by this act, that jurors there should have certain qualifications of property, and that, on a false verdict, a bill of attain might be sued in the hustings: if the jurors were convicted, they were to be fined 20*l.* or more, at the discretion of the court (d); so that all idea of the villainous was entirely abandoned.

As actions upon the case had of late very much increased, and had supplied the place of many ancient remedies, it was thought they should no longer be subject to the delay which was incident to the old process. It was therefore enacted by stat. 19 Hen. VII. c. 9. that the like process should be in actions upon the case, as in actions of trespass and debt, when sued in the king's bench or common-pleas; for those only are mentioned in the statute. It should seem, that actions upon the case in other courts, not being affected by this statute, must be prosecuted with the common-law process of attachment and distress, as before (e):

Among the provisions for improving the administration of justice, we must reckon a statute for correcting some

(a) Stat. 23 Hen. VIII. c. 3.

(b) 11 Hen. VII. c. 25.

(c) Vid. ant. vol. II. 212.

(d) Stat. 11 Hen. VII. c. 21.

(e) Vid. ant. vol. II. 437, &c.

abuses in the sheriff's court. There was great extortion and collusion practised by under-sheriffs and their clerks, and bailiffs; the principal of which was, the entering of plaints without the consent of plaintiffs, and sometimes where no such persons existed; after which they omitted to attach or summon the defendant, but left him to incur defaults, for which they made great levies upon him. To remedy this, no plaint was to be entered without pledges being found; a penalty of forty shillings was imposed on the sheriff if he entered more than one plaint for one trespass or debt. The party grieved might complain to a justice of peace, who had authority to punish the sheriff and his officers: several other directions were given for submitting this mischief to the correction of the justices of the peace (a).

The alteration made in the law of crimes and punishments in this reign seems as remarkable, and of as extensive consequence, as any alteration respecting the law of property. The criminal code begun now to assume a sanguinary appearance, which every reign since has been heightening.

The changes made in our criminal law consist either in the new crimes which the legislature created, or in such regulations as were made for the administration of justice.

One treason was created in this reign. By stat. 4 Hen. VII. c. 18. it was made high treason to counterfeit the coin of any foreign realm permitted to be current here. Another act was made to prevent the circulation of clipped and base coin; in which the exportation of bullion to Ireland, or the importation of gold or silver coin from thence, is punished with imprisonment; that being the quarter from whence this commodity was most frequently conveyed to this kingdom (b).

The hunting in parks with visors and painted faces, was punished by stat. 1 Hen. VII. c. 7. and if a warrant

(a) Stat. 11 Hen. VII. c. 15. (b) Stat. 19 Hen. VII. c. 5.

was issued against such offender, and he wilfully concealed the offence, or resisted, or disobeyed the warrant, he was guilty of felony.

It was made felony by stat. 3 Hen. VII. c. 2. ^{stealing} to take away any woman against her will unlaw- ^{women.} fully, whether she be maid, widow, or wife; and the takers, procurers, abettors, and those who receive such woman, are all made *principal* felons. A woman so taken must have substance in goods or lands, or be heir apparent, and must be married, or deflowered, to make the taking an offence under this act. There was a proviso that this should not extend to a person who took a woman claiming her as his ward, or bond-woman (a).

The last new felony we shall mention was inflicted by stat. 3 Hen. VII. c. 14. which made it felony for any servant of the king, being inrolled in the cheque-roll, to compass or imagine the death of the king, or of any lord, or privy-councillor, steward, treasurer, or comptroller of the household. This offence is to be inquired of by twelve persons, inrolled in the cheque-roll, before the steward, treasurer, and comptroller of the household. The punishing the bare intention to murder a lord, without any overt act declaratory of such intention, makes this a very remarkable provision; the security of these personages being put on the same footing with that of the king. The occasion of this is stated in the statute; that such malevolent designs among the household servants lead to attempts which endanger the king himself; and that a recent fact of that kind had induced the parliament to make this statute.

Some provisions were made for the punishment of inferior offenders. A statute was made for the suppressing of riots, and another for the better execution of former laws on that head (b). The first penal law was now made against the canonical offence of usury. Brokers of such

(a) Vid. ant. vol. III. 277.

(b) Stat. 11 Hen. VII. c. 7. and stat.

12 Hen. VII. c. 13.

bargains were to be set in the pillory, imprisoned half a-year, and fined twenty pounds (a). Persons lending money, or bargaining for lands, or goods, on usury, were to forfeit half the value (b).

The execution of penal laws was a subject much attended to by this prince. In order to accomplish this end, the criminal jurisdiction of some ancient courts was extended, and the course of proceeding was greatly facilitated. The most material changes of this sort were made by stat. 3 Hen. VII. c. 1. and stat. 11 Hen. VII. c. 3. which, among provisions of real and permanent utility, furnished some innovations that were afterwards disapproved and abrogated.

The first clause of stat. 3 Hen. VII. c. 1. made some alteration in the jurisdiction of the council, which had lately been more familiarly called the *star-chamber*. The remaining part of that statute is taken up with several provisions relating to criminal justice, which we shall defer for the present.

The *star-chamber* new-modelled. The criminal jurisdiction exercised by the king's council we have had occasion to notice in the early periods of this History; and it has been observed that they sat in this capacity sometimes *en la chambre des estoyers*, which had of late years become their most usual place of sitting; and therefore the council was now most commonly called the *star-chamber* (c). There are many instances where this tribunal had exercised its authority in the period immediately preceding the time of which we are now speaking (d). This judicature, in its original establishment, was very extensive, and comprehended a great variety of objects within its cognisance. As the constitution of our legal polity became more settled, and the boundaries of justice more exactly defined, this extraordinary authority was in proportion circumscribed. Several statutes had been

(a) Stat. 3. Hen. VII. c. 6.

(b) Stat. 11 Hen. VII. c. 8.

(c) Vid. ant. 87. Lamb. Archeion, 149.

(d) Lamb. Archeion, 149 to

154. 4 Inst. 60, 61.

passed imposing restrictions on the access of complainants to this extraordinary judicature (a). But, notwithstanding this apparent jealousy of the council, the parliament had; at other times, gradually restored to it some of its ancient authority, by referring to that tribunal the cognisance of many enormities which were before inquirable at common law; and which, as such, were not to be examined by the council. Thus, compared with its original powers, the prerogative-judicature of the king in council was much restricted by positive constitutions; and from being, in some degree; above the law, had shrunk into a compass so small, and had withal become so precarious in its foundation; that Henry, who meant to make much use of this court, thought it stood in need of some parliamentary sanction to give it support and authority. These were the reasons which probably led to enacting stat. 3 Hen. VII. c. 1. a statute which did not erect, as some have imagined, but only *new-modelled* the court of *star-chamber*. Indeed, the establishment given to this court by the statute of Henry, was partial; and confined to certain instances therein enumerated. The design, scope, and extent of this act will be best seen by a rehearsal of it.

The preamble states, that "the king, remembering how by unlawful maintenances, giving of liveries, signs and tokens, and retainers by indentures, promises, oaths, writings, or otherwise, embraceries of his subjects, untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money by juries; by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued; and for the not punishing of these inconveniences; and by occasion of the premises; little or nothing may be found by inquiry;" that is, by the ordinary proceeding by an inquest of jurors; "whereby the laws of the land in execution may take little effect, to

(a) Vid. ant. vol. III. 273.

the increase of murders, robberies, perjuries, and insurrections of all men living," &c. for the reformation of which it was now ordained, that the chancellor, treasurer, and privy-seal, or two of them, calling to them a bishop and a temporal lord, being of the council, and the two chief justices, or, in their absence, two other justices, upon bill or information put to the chancellor for the king, or any other, against any person for any misbehaviour abovementioned, *have* authority to call before them by writ or privy-seal the offenders and others, as it shall seem fit, by whom the truth may be known; and to examine and punish after the form and effect of statutes thereof made, in like manner as they ought to be punished, if they were convicted after the due order of the law.

This is the substance, and nearly the very words, of the statute; which plainly point out the occasion of this new regulation, the objects of cognisance, the judges, the process and proceedings, with the power of punishing; from which it is manifest, that the king's council derived from this statute an enlargement of its judicial authority. There is nothing prohibitory of the former jurisdiction or mode of proceeding here; but that is, on the contrary, recognized, as it were, and affirmed by the very cautious manner in which the enacting part of this statute is worded: for, instead of saying that those great officers *shall* have authority, it barely declares that they *have* authority; thereby plainly intimating an apprehension of a pre-existent authority, and only declaring more particularly the exercise of it in some certain cases.

It should seem, that whereas, before this statute, the king and council did not admit any complaint but such only as carried with it, according to *Lambard's* expression, a reasonable surmise of maintenance of their jurisdiction (*a*); for proof also of which the complainant ought by stat. 13

Hen. VI. c. 4. to give sureties; now, by this act, besides that ancient authority, three only of the council, namely, the chancellor, treasurer, and privy-seal (taking to their assistance others thereby appointed), were enabled to hear and determine ordinarily of those eight offences above-mentioned, and that without any manner of such suggestion or surmise at all.

Some defects of this statute were supplied by stat. 21 Hen. VIII. c. 20: by which the president of the council is added to the former three principal persons. A doubt which arose upon this act, soon after the passing it (*a*), whether the bishop, lord of the council, and justices, were only assistants, or had equal authority with the three great officers, was removed by this later act; which declares, that they were only there for their advice. Lastly, the bill or information, which by the former act was to be exhibited to the chancellor, was by the later to be put in generally; that is, to the king, as formerly.

Thus by the operation of these two statutes, the above-mentioned eight offences, which before were mostly cognisable by indictment or action, might now be arraigned and tried without any inquest or jury, on the bare examination either of witnesses or of the parties themselves. This innovation was devised, says the statute, because the ordinary proceeding at common law was found unable to reach such offenders. However, the punishment to be inflicted was such as would have followed, had the prosecution been at common law.

The alteration made as to these offences by this act, consists principally in the circumstances of process, judges, and trial; the nature of the crime and its punishment remaining as it was before. If, therefore, the council departed from the measure of the penalty, or in any consider-

ation of the crime varied from the judgment of the common law, it must be understood, that they then acted under the former authority which they originally possessed as the council of the king, and not by virtue of these statutes. For that authority still remained; and the council, in the understanding of the law, and in the execution and practice of their authority, sat and acted in both capacities, as appears by the books of entries during the reigns of Hen. VII. and Hen. VIII. which two princes did often sit there in person, under each jurisdiction (a).

It is to this mixture of judicial power that the star-chamber was indebted for the tremendous authority which it began to exercise soon after this time. While the statute of Hen. VII. gave vigour and efficacy to its proceedings, the immeasurable extent of its ancient jurisdiction furnished an inexhaustible source of crimes and punishments, to be called forth on all occasions, and for every purpose. It became, on that account, the happiest instrument of arbitrary power that ever fell under the management of an absolute sovereign; as may be seen in the history of the princes of the house of Tudor, who owed the maintenance of their high prerogatives principally to the aid of this tribunal. The star-chamber exercised a criminal jurisdiction almost without limitation, and altogether without appeal; taking upon it to judge and adjudicate upon every thing in which the government felt itself interested. It became, in truth, as much a court of state, if the expression may be allowed, as a court of law, by punishing all obnoxious persons; who, though they had been guilty of no breach of the law, had, nevertheless, some way or other offended the prince or his ministers. As the members of this tribunal were the confidential officers of the crown, there was no difficulty in those times of procuring a sentence against off-

(a) Lamb. Archæon, 168, 171, 172, 173.

fenders of that description. The penalties inflicted by this court were so extravagantly severe, and the very design of its judicature so repugnant to the spirit of a free constitution, that it was always viewed with the greatest abhorrence by the subject; and at length, when political liberty began to vindicate its claims with more boldness, was totally abolished by parliament (a).

Another innovation upon the common law, ^{Informations} and of a much more general nature than the ^{at the sessions} former, was effected by stat. 11 Hen. VII. c. 3. ^{and sessions.} The commencing of prosecutions by information had grown into common use in the reigns of Henry VI. and Edward IV. and were generally confined to penal statutes, and likewise to the court of exchequer and king's bench. But the abovementioned statute permitted justices of assize and of the peace, upon information, to hear and determine without a jury all offences (except treason, murder, or felony) committed against any statute not repealed. This act was probably dictated by that prevailing inclination of Henry and his ministers to enforce the observance of old penal statutes, or rather to compel payment of such penalties as were incurred by a breach of them. This scheme of filling his exchequer was unpopular, and therefore not fit to be trusted, in any part of it, to the verdict of common jurors. Whether this, or a general jealousy of the trial by jury, was the reason of the law, it was a regulation not to be endured, and was repealed in the beginning of the next reign (b).

It was by colour of this act that Empson and Dudley were enabled to effect such infinite oppressions and exactions upon the people. For this purpose, too, a new office was erected, and those two persons were made *masters of the king's forfeitures*. The reason of repealing this act is stated to be, "for that by force thereof it was known

(a) By stat. 16 Car. I. (b) By stat. 1 Hen. VIII. c. 6. c. 10.

many sinister, crafty, feigned, and forged informations had been pursued against many of the king's subjects, to their great damage and vexation."

Such were the innovations made in the judicature of our criminal courts: we are now to notice what alterations were made in the course of proceeding and prosecution, which brings us back to the famous stat. 3 Hen. VII. c. 1. We have seen, in the last period, some parliamentary regulations regarding jurors, dictated by a suspicion that they did not discharge their trust with impartiality and truth^(a). Among Henry's schemes for a due execution of the law, one was to oblige inquests to be very strict and regular in making their presentments. In the clause of stat. 3 Hen. VII. c. 1. next after that for the institution of the new form of the star-chamber, it is ordained, that justices of the peace "may take by their discretions an inquest to inquire of the concealments of other inquests;" and every person of such inquest was to be punished for the concealment by the discretion of the justices. This was a refinement upon the proceeding by inquest in criminal matters; and was in the nature of an attain in civil causes.

Appeal of murder. An appeal of homicide still continued a common mode of prosecution, notwithstanding the frequency of indictments; and the genius of the times so disposed persons to favour this vindictive action, that no indictment of murder used to be tried till the year and day after the fact (the period limited by law for commencing an appeal); lest the offender, being acquitted or convicted on the indictment, might plead such acquittal or conviction in bar of the appeal. After this space of time had elapsed, it often happened, either by the death of witnesses, or the zeal for justice subsiding, that prosecutions were intirely dropped; and the delinquent escaped unpunished. Again,

(a) Vid. ant. vol. III. 280. 286.

an appellor must sue in person; and the suit being long and expensive, he frequently became tired of the prosecution; so that, with all these impediments, justice was not regularly enforced against this kind of offenders. To remedy this in future, the following regulations were made by this act. It was enacted, that if any principal or accessory in murder be indicted, he may be arraigned and tried at the king's suit at any time within the year, and not tarry the year and day for the appeal; and should he be acquitted, the justices are not to discharge him, but either remand him to prison, or let him to bail, till the year and day is past; within which time the person so acquitted, or even if he should be attainted (and not have the benefit of his clergy), the person so attainted may yet be appealed by the wife or next heir before the sheriff and coroners, or in the king's bench, or at the gaol-delivery. To facilitate likewise the prosecution of such appeal, it was allowed, that where battail did (a) not lie, the appellor might sue by attorney.

The power of trying an offender a second time for the same offence is confined to cases where the party had not had his clergy, because a clerk so delivered to the ordinary was to be subjected to canonical punishment, and was no longer within the jurisdiction of the temporal judge. This provision, though reasonable when first made, has occasioned, by the alteration that has since taken place in the disposal of clerks, a very singular distinction; for it now happens, that though a man acquitted of an indictment for murder may afterwards be appealed, yet a person who is found guilty of what is at present considered as a less offence, under the name of manslaughter, is not liable to be appealed under this statute, because his clergy has been allowed.

The other parts of this act either enforce the observance of certain common-law proceedings in case of murder,

(a) Vid. ant. vol. III. 419.

or direct some new methods to be followed on the like occasion.

It was declared, in the spirit of our old law (*a*), that should any one be murdered in the day-time, and the murderer escape, the township should be amerced; and that as well the coroner should inquire thereof upon view of the body, as justices of the peace, who were to certify it into the king's bench. Coroners were to deliver their inquisitions before the justices of the next gaol-delivery within the county; and if the murderer was in gaol, they were to proceed to the trial of him, or put the said inquisitions to the king's bench. For this trouble the coroner was to have a fee of thirteen shillings and fourpence for the inquisition, to be paid by the township if the murderer had no goods: a penalty was inflicted for neglect of duty. As a part of the same scheme for preventing public disorders, and for keeping the police under good government, it was directed, that justices of the peace should certify at the next sessions all recognisances of the peace, that the party bound might be called; and if he did not appear, the recognisance, with the record of default, was to be certified into the chancery, king's bench, or exchequer.

Bailing felons by justices of the peace. The authority of justices of the peace was further strengthened by c. 3. of the same statute.

By stat. 1 Rich. III. (*b*) every justice of the peace was permitted to bail persons arrested for light suspicion of felony; but this authority, as it was given to every single justice, had been abused, and many heinous offenders, not maimpernable by law, had been let out upon the country; so that this statute, which was designed only to alleviate the condition of felons before trial, had contributed to obstruct the execution of justice. To obviate this, that statute was now repealed; and it was further ordained, generally,

to bind to good behaviour all persons who were so bailed.

(*a*) Vid. ant. vol. II. 22. . . . (*b*) Vid. ant. 128.

that the justices of peace in every county, city, or town, or two of them at least, shall have authority to let to bail persons imprisonable by law, to the next general sessions, or gaol-delivery; and one of them at least was to certify the same to the sessions or gaol-delivery, under the penalty of 10*l*. Sheriffs and keepers of gaols were to certify the names of their prisoners at the next gaol-delivery, to be calendared before the justices of the deliverance of the gaol, under the penalty of 5*l*. In this manner was the article of bailing felons, and the delivery of gaols, begun to be put in the course it has continued in ever since. The sure custody of prisoners was provided for by a statute, which declared all county gaols to be in the keeping of the sheriff, and ordained several penalties upon him and his officers, if they suffered felons to escape (a).

In the next year a provision was made which it was thought would contribute to a due discharge of the important trust reposed in these magistrates. By stat. 4 Hen. VII. c. 12. a proclamation, therein set forth, is directed to be read at the sessions four times a-year. This exhorted persons who had cause of complaint against any justice, to state their grievance to any of his fellow-justices in the neighbourhood; and if he gave them no redress, then to the justices of assise; and should they still think themselves not redressed properly, to the king or his chancellor.

The benefit of clergy, that impolitic exemption, began now to be modelled by the legislature almost into a new form, and applied to the purpose of penal restriction with reason and effect. It became a distinction between offences, and not between persons; and being taken away from offenders in some crimes, or some circumstances of crimes, and not in others, it served to proportion the degree of punishment according to the true

(a) Stat. 10 Hen. VII. c. 10.

measure of distributive justice, the heinousness of the offence.

This privilege being designed at first only for the actual clergy, was, it has been seen, by degrees extended to all who could read, and so were *capable of becoming clerks*. Though the stat. *de clero*, 25 Ed. III. by specifying the orders of clerks that should be intitled to this privilege, excluded actual laymen from claiming clergy; yet the former latitude soon prevailed again, and a capacity to read became once more synonymous with clergy (a): it had also been the usage to allow it to all such felons in every single offence. This deviation from the original idea, which permitted every one who could read to commit any felony with impunity; though an enormous abuse, did not so shock the understandings of men bigoted to an ecclesiastical tyranny, as to excite at once an entire reform. The legislature proceeded gradually and with reverence for the ancient privilege they were about to invade; and attacking first those who had least claim to indulgence, they sacrificed all lay offenders to the demands of justice. By stat. 4 Hen. VII. c. 13. laymen are allowed their clergy only once; and (probably to prevent their imposing on the court at a second trial, and praying their clergy again) it is ordained, that every person so convicted shall, if it is for murder, be marked with an M upon the brawn of the left thumb, and if for any other felony with a T; which marks are to be made by the gaoler in open court in presence of the judge, before the party is delivered to the ordinary. Those who are actual clerks, are, upon a second trial, if they have not ready their letters of orders, nor a certificate thereof from the ordinary, to have a day appointed by the justices to bring them in; and if they fail at the day, they are to lose the benefit of their clergy, like those who are not in orders, 13 Hen. VII. c. 13.

(a) Vid. ant. vol. III. 421.

Thus was the ancient claim of clergy taken away from certain persons, who were considered as not answering the description of clerks properly intitled to that privilege. This was followed about three years after by another statute, which related not to particular persons, but to particular offenders, who were thereby deprived of this benefit. The stat. 7 Hen. VII. c. 1. having provided several penalties in cases of desertion from the army, enacts, that soldiers departing out of the king's service without the licence of their captain, shall be deemed felons; and "forasmuch (says the statute) as this offence stretcheth
" to the hurt and jeopardy of the king our sovereign lord;
" the nobles of the realm, and of all the common-weal
" thereof," a person so offending shall not enjoy the benefit of his clergy. Such prevalent reasons did the parliament think it necessary to state for curtailling this privilege, which had been enjoyed by felons for several centuries.

Some few years after, an accident happened, which brought the subject of clergy again under consideration of the legislature. One *James Grame* had murdered his master, and a special act of parliament was made for the punishment of this heinous offence, which otherwise would have escaped under the exemption of clergy. It was therefore enacted by stat. 12 Hen. VII. c. 7. that this person should be attainted of the murder, as a felon, in petit-treason; and should be drawn and hanged, as persons who are no clerks, notwithstanding any privilege of clergy. It was also further ordained, that for the future, if any lay person premeditatedly murder his lord, master, or sovereign immediate, he shall not be admitted to his clergy.

Thus far, and no farther, did the legislature venture to go, in taking away the privilege of clergy, during this reign. They confined themselves to an instance where the safety of the kingdom was immediately interested, and to a crime which stood in the highest order of private

gress they would of themselves, as a subject of legal discussion, naturally make towards attaining a more artificial form, particularly as they were now connected with questions of entails, the statute of Richard III. by giving a power to *cestui que use* concurrent with that of the feoffee to make common-law gifts and conveyances, gave rise to perplexities of a new sort.

The following are instances of the sort of argument which arose upon this statute, and of the construction it received in the courts. If *cestui que use* in tail made a feoffment in fee, this bound him and his feoffees during his life, by stat. 1 Rich. III. but after his death, his heir or the feoffees might enter, for it was only a grant of his own estate; the like of a tenant for life of a use; for his feoffment could not induce a forfeiture, a use not being such property as could be forfeited (*a*). It was held, that when *cestui que use* made a lease for life, the reversion was in the feoffees who should have the action of waste, notwithstanding there was no privity. It was held, that a reservation of rent might be made on a grant under this statute; though there is no mention of it in the statute (*b*); but it could not be made without deed. If *cestui que use* made a feoffment on condition, and entered for the condition broken, he might retain it absolutely against his feoffees; for as the fee and right was intirely out of them by the feoffment, they could not by law enter upon him; though it was held in case of a man seised *in jure uxoris*, that he, upon his re-entry, should be seised in the former right and not in his own (*c*).

Cestui que use desired in his will, that his executors might sell his woods; and this was held to be warranted by stat. 1 Rich. III. (*d*). If a man devised his land to be sold by his feoffees for payment of his debts, and the feoffees neglected to do it, the creditors might have a

(a) 4 Hen. VII. 18.

(b) 21 Hen. VII. 25.

(c) 5 Hen. VII. 5.

(d) 14 Hen. VII. 14.

subpœna. If the devise was general, it was agreed, that the executors, and not the feoffees, were the proper persons to sell (a). Notwithstanding this apparent liberality, yet so strictly was *cestui que use* tied up to the words of the stat. 1 Rich. III. that all the justices held, he could not make livery by attorney, because that power was not given by the act (b). Again, it was holden by all the justices of the common-pleas, that the *cestui que use* could not take beasts damage feasant in his own name, as he had nothing but the occupation at the sufferance of the feoffees, who might have the action, and so the trespasser would be punished twice; but those to whom *cestui que use* conveyed any interest under the statute, might justify in their own names: the statute therefore seems wholly made in favour of the alienee (c).

In the seventh year of the king, it was agreed by the whole court, that execution of a statute merchant or staple, or a writ of *elegit*, might be had against the land of *cestui que use*; for though the word execution was not in the statute, yet this sort of execution was considered as within the equity of it, being in effect a sort of lease (d). Thus it appears, that stat. 19 Hen. VII. was so far only a declaration of the common law (e). The power given to *cestui que use* by this statute, was wholly unconnected with any interest; but this, such as it was, together with the common-law power and interest of the feoffees, produced such a complication of rights and titles, as must give rise to many intricate questions of law.

As to conveyances to uses, hitherto we have taken notice only of feoffments and fines to a use; but it appears in this reign that a new method had been practised, which, particularly since the statute of Richard III. had entirely

(a) 15 Hen. VII. 11. (b) 9 Hen. VII. 26. (c) 15 Hen. VII. 2.

(d) 7 Hen. VII. 6. (e) Vid. ant. 139.

superseded the necessity of any common-law conveyance : Bargain and sale. This was done by bargain and sale. This was done in two ways : either the *cestui que use* sold to another the use, and the feoffee from that time stood seised to the use of the vendee ; or, the bargainor being seised of the actual freehold, sold the land to the vendee ; in which case he stood seised to the use so sold. This was transacted without even the formality of a deed, and was held good even in a court of common law, by virtue of the late statute (a). The validity and sense of this conveyance depended upon the fairness of the contract. The vendee having paid the money, had done that which imported in itself a good consideration ; and as in the last of the two instances before stated, he could not have the land, there being no conveyance of it ; and he had really contracted for the use in the former, which was the only thing residing in the *cestui que use* ; it was reasonable that he should have a title to the profits ; which might, even before the statute of Richard III. be enforced in a court of equity.

Thus a bargain and sale rested upon the goodness of the consideration. Indeed, in all cases, so essential was a consideration to give being to a use, that it grew to be a maxim, that where a feoffment was made without consideration, the use resulted back to the feoffor, and the feoffee was seised only to the use of the feoffor. The reason of which was this : The determination on the validity of uses being left with the chancellor, who judged according to conscience and equity, he thought that when a feoffment was made, and it remained doubtful whether it was in use, or in purchase ; considering that purchases were notorious, and would generally prove themselves ; and that uses were secret, and needed strong reasons to support their existence ; he, perhaps, thought it more expedient to put a purchaser to prove his consideration, than the feoffor and his heirs to

(a) 21 Hen. VII. 6. b.

prove the trust; by which means the intendment was always in favour of the feoffor's use, and the purchaser must produce proof of some consideration to shew that it passed to him (a).

Hence it was that a consideration became the great point upon which those deeds of conveyance turned, that were afterwards invented in order to raise and to convey uses.

One of these was by way of *covenant*; which Covenants to had been attempted in this reign for the first stand seized. time, but without success. The following was a case of that kind: It was covenanted by a man and his wife and B. that B. should have the land to him and the heirs of his body; and upon default of such issue, that the land should remain to the husband and his wife in fee. This was held to be void. Another instance, where this new conveyance was again tried, was, where it was covenanted that the lands and tenements of one should *descend*, revert, or remain, to his son and heir apparent in consideration of marriage, and to the heirs of him and his wife. It was adjudged that this covenant did not change the use, for two reasons: one was, that it was a matter in *future*, and not executed; the other, because it was put in the alternative, and therefore was uncertain whether to remain or revert. It was accordingly held, that the parties had no remedy but, by action or covenant. When another covenant of marriage of the same nature was brought in question, in 21 Hen. VII. (b) the same opinion was still adhered to.

But although these deeds were rejected by the courts of law, which seemed determined not to allow that an use should be raised by covenant, it cannot be doubted but such conveyances met with favour in the court of chancery; which, considering the nature of an use as existing merely by contract and agreement, could hardly hesitate about decreeing the specific performance of a deed so peculiarly

(a) Bacon's Tracts, 317.

(b) 21. Hen. VII. 18, 19.

adapted to the purpose for which it was formed. We are induced to think they really were supported in chancery, from the many precedents now extant (a) of such covenants made in this reign : great estates were mostly settled in this way ; and in the next reign we shall see that these covenants were expressly adjudged legal by the courts of law.

These deeds were usually made on the occasion of marriage, in order to make a settlement of some part of the estate for the benefit of the widow and the issue. They were made sometimes before, and sometimes after, marriage ; and were expressed to be made on that or some other consideration. The disposition thereby usually made, was, an estate for life to the husband and wife *jointly*, remainder to the issue of the marriage in tail, with remainders over. These were again qualified with provisos and conditions, upon which estates were to cease or commence, and uses were to arise or be revoked, in a stile and with a length unknown to the simplicity of the common law. These novelties, however, were greatly multiplied by the fancies of conveyancers in the next and subsequent reigns.

The joint estate for life to the husband and wife was intended as a maintenance for the wife, if she *survived*, in lieu of her dower, of which she was deprived where her husband's estate was in use, and not in seisin. This was now the case with much of the landed property of the kingdom ; and therefore these *jointures*, as they were called, were become very common.

The most important decision in this reign, was that which gave a new efficacy to ejectments, by adjudging a recovery of the term as well as damages ; the consequence of which was, that writs of assise of novel disseisin, with writs of entry and of right, went out of use ; and a title to land was, in the subsequent periods of our law, generally tried by ejectment.

(a) Vid. *Mad. Form. Angl.*

An action *de ejectione firmæ*, or ejectment, we have seen was a remedy by which a lessee being dispossessed of his term in land, recovered damages against the wrong doer, for the trespass in ejecting him. It had therefore a different object from the other remedies in such cases; one of which was a writ of covenant, the other a writ of *quare ejecit infra terminum*. The first lay only against the lessor, and had long ceased to give the plaintiff any restitution, but merely damages for the ejectment: the second lay only against the alienee of the ejector. The *ejectione firmæ* gave a remedy against the ejector, but it was only in damages; so that with all these forms of action, a termor for years might, notwithstanding, be actually deprived of the possession of his term, without restitution by the common law, if the land continued in the hands of the ejector. Leases for years had now grown to be of greater value, from the length to which it had become the practice to grant them: accordingly, the court of chancery began to take that cognisance of them which the common law refused, but which they at present deserved; and by a rule of redress, in which that court much delights, used to decree the ejector to make a specific restitution of the land for the remainder of the term.

The courts of law seemed lately to incline towards adopting this method of doing substantial justice. In the reign of Edward IV. we have seen it was declared by Fairfax(a), that a plaintiff in ejectment should recover possession of his term, as he would in a *quare ejecit infra terminum*; and it was accordingly so adjudged solemnly in 14 Hen. VII(b). A copy of the record of this case is still to be seen in Rastall(c), where the judgment is, *quod recuperet terminum suum prædictum*; a judgment not warranted by the original writ, which goes only to damages for the trespass, without any hint at restitution. Soon

(a) Vid. ant. vol. III. 390. (b) Jeak. Cent. pa. 67.

(c) 14 Hen. VII. 244. b.

after this important resolution, ejectments were applied to recovering possession of land, and trying titles, as a remedy more simple, and less inconvenient and tedious, than the multifarious and complicated proceedings in the great variety of real actions.

That an ejectment in this manner might restore the possession where a *bona fide* termor in lawful and permanent possession was actually ejected, is obvious enough; but how the same proceeding could be applied to try titles, in all cases, it is not perhaps so easy to imagine.

It should seem that the first way of bringing ejectments to try titles was plain and regular, differing nothing or very little from what this action was, when brought to redress a real trespass, and to recover damages for it. Something was to be contrived in exact conformity with such original object. As a term was to be recovered, a term must first be created, and an ejectment from that term must be effected, upon which the action was to be grounded. It is probable, then, that a person claiming title used to enter on the land, and there seal a lease to *A*. This transaction might or might not be known to the tenant in possession. The construction of law upon this would be, that, of the two tenants, he was the trespassor who had no title to the possession; and he barely by being there, without any other act, committed, in law, an ejectment of the other; an ejectment, like a disseisin, being a wrong which a man might admit himself to have suffered, merely to take advantage of the remedy which the law in such circumstances would give him. *A*, the lessee, would, for the present purpose, suppose the title to possession to be in himself; and the two requisites for this action being obtained, he would serve a writ of trespass and ejectment against the tenant in possession, declare, and go on to trial. Then the plaintiff *A*. produced the title of his lessor, and the defendant the tenant produced that of his lessor; and so the right

was completely examined; for the title to make the lease, being enquired into as a prefatory matter, they thereby collected who was the trespassor; which was the direct point of discussion in this action.

This seems to have been the obvious, and was probably the first way in which a title to land was tried by ejectment. It was regular and simple, consistent with the process and proceeding in other actions; but the legal notion of trespass and ejectment was of such latitude, as to leave an opening for fraud and artifice to introduce some singular novelties into the proceeding by ejectment. If the tenant might be considered as a trespassor by continuing in the possession after the lease made to *A.* so might every one of his servants, and every stranger who *casually* came on the land; and these, equally with him, might be made defendants, and put to shew by what authority they were there. The person claiming title would sometimes take advantage of this, and get a friend to come on the premises just after *A.* had been put into possession by sealing the lease. This made him instantly, in law, a trespassor and ejector. He was served afterwards with a writ and declaration, upon which he would give the plaintiff judgment by default; and an *habere facias possessionem* issuing, the tenant in possession was turned out, in order that the plaintiff might have full and clear possession according to his judgment; the tenant being put to the necessity of bringing an ejectment, in his turn, to recover back the land.

A practice like this, so unfair and unjust, could not long subsist: the courts took it up, and, in order that the tenant might always be in a capacity to defend himself, made it a rule, that execution should not issue, till the ejector, if a stranger, had given notice to the tenant that an action was commenced against him, submitting to him whether he would defend it; upon which the tenant was allowed to defend it, in his place. However, not-

withstanding this rule took away all the advantage gained by these clandestine ejectments, the practice of proceeding first against some stranger, called since a *casual ejector*, was still kept on foot; for the judgment obtained in this manner remained still good in law, notwithstanding the tenant was admitted to try his right: it put him under the necessity of defending the action, lest he should be turned out; and, should it be determined by a jury in favour of the plaintiff, execution would issue on that much sooner than could be obtained by judgment on the verdict.

Thus did ejectments receive a new form, owing to circumstances necessarily attending them, and to certain consequences following from the legal properties of a trespass. As there can be little doubt but an ejectment was conducted in the simple manner we have above supposed, when first made use of to this purpose; so there can be little doubt that it became, very soon after, the practice to make a casual ejector, and to proceed as just related; the lessee and casual ejector being real persons, as well as the entry and ejectment real facts. Such the practice continued till the end of queen Elizabeth's reign, and some years after, when the practicers got into the habit of shortening the process very materially; and the judges endeavoured to expedite this useful action by some orders of court; so that, all together, it is now become a very singular and complicated proceeding.

Though it had been adjudged that the term should be recovered in ejectment, it cannot be supposed that damages were not, as formerly, recovered for the injury sustained by losing the intermediate profits; judgment therefore used to be as well for the mesne profits as the term. In after-times, when an ejectment came to be considered rather in the light of a real action, the plaintiff rarely prepared himself to prove the actual damages; upon the ejectment therefore he took only nominal damages,

and afterwards brought a new action of trespass for the mesne profits; of which action there is no mention till some time after the reign of queen Elizabeth.

As this action of ejectment, in the form of it, is for the trespass, and not for the right; every fresh trespass, which could easily be effected in the way above stated, is a fresh cause of action, and the right will every time be incidentally examined; very different from trying a right in some real action, where a judgment once given was either a final bar, or drove the party to a writ of a higher nature, very often more tedious in its process. From hence it followed, that a title might be tried over and over again between the same parties, though they had each had verdicts against them. The gratification of trying a title more than once, together with the ease with which this action was conducted, contributed to make it a favourite both with our courts and with suitors. This innovation gave the last blow to real actions, which, from the period when ejectments came into practice, went into disuse: a revolution that at once consigned to oblivion at least one-third of the ancient learning of the law.

Whether this was a change for the better, has been doubted by lawyers of some knowledge and experience. On the one hand it has been said, that real writs were in their nature so special, and in their application so unaccommodating, that they were very unmanageable instruments in the hands of the practitioner. Some were to be brought in a particular court; some lay only between particular persons; others, for and against those who had only particular estates; with various other circumstances that were requisite, antecedent to the bringing of the action: all these were at once supplied by an ejectment, which requires nothing but a present possession in the defendant, and a right to it in the plaintiff. On the other hand, the precision of the proceeding in real actions, where

the matter in question was thoroughly canvassed in pleading, and reduced to a simple point before it was trusted to a jury, is thought to be ill changed for the present course, where the whole question is at once sent in the gross to trial upon the general issue, without any previous attempt to simplify or decide it with less circuitry and expence. As to the length of process, and other delays in real action, they, it is said, might have been easily corrected by act of parliament.

Though the practice had begun of applying ejectments to this purpose^(a), there are no questions arising upon such actions in the Year-book of this reign. Many titles to real property are there debated in trespass and replevin. But the remedies by real action continued still to be the practice of the time, though destined to give place to this new-modelled remedy in the next and succeeding reigns. With real actions fell a great part of the business of the common-pleas; in them that court had possessed an exclusive right of judicature, which now begun to be imparted to other courts. Land, as a subject of action, was now in the same predicament as other matters of contract, and might be decided upon, in an ejectment, in any court in Westminster-Hall. The king's bench, which from a criminal jurisdiction had long before possessed itself of personal actions, by help of fiction and intendment, received its share of this accession; and from thence derived an addition to its civil business, which was greatly increasing from other causes. This was another consideration that contributed to bring this action into vogue. The practicers in the court of king's bench and Exchequer saw a medium by which they might partake in the valuable practice of the common-pleas, and of course would give every credit to such a contrivance.

(a) Rast. Ent. 243, 244.

The opinions delivered in the reigns of Henry VI. and Edward IV. in favour of actions upon the case, for the non-performance of a promise, were confirmed by the train of decisions in this reign. In 3 Hen. VII. an action was brought against a defendant, who, for a sum of money, had undertaken to procure a lease for a person; but instead thereof, he obtained it for himself, in deceit of the plaintiff. When it was objected, upon the old notion, that nothing having been done, no action would lie; as there was no *mis-feasance*, but merely a *non-feasance*; *Brian* demanded, whether if he promised, upon consideration, to make a feoffment to one person, and afterwards made it to another, that would not be a great *mis-feasance* (a)? endeavouring in this manner to satisfy the scruples of such as still adhered to the ancient opinion; we are told that the court agreed with him. Conformably with this decision, it was declared in 21 Hen. VII. by the whole court, that an action upon the case would lie as well for a *non-feasance* as for a *mal-feasance* (b); and this opinion was on another occasion again recognised (c); at which time it was said, that if a man bargained that another should have his land in fee for such a sum of money, and neglected making an estate accordingly, an action upon the case would lie without any need of suing a *subpena* in chancery (d). As the necessity of recurring to a court of equity to establish such agreements was not now so absolute as before, there is no doubt but suits on such questions fell back again into the old channel of the common law. The prodigious advantage of this common-law remedy, to substantiate promises and undertakings, was soon discerned by the legislature, which, on this account, as well as on account of the other applications that were made of this action, in this reign passed an act which gave to the action upon the case the same process as was before in an action of debt.

(a) 3 Hen. VII. 14.

(b) 21 Hen. VII. 30.

(c) *Ibid.* 41.(d) *Ibid.*

There still remained doubts in what particular cases law-wager should be allowed, and in what not. In the reign of Henry VI. (a) it was doubted by *Newton*, *Paston*, and *Aston*, justices, whether in an action of debt brought against an abbot for things sold to his predecessor, with an averment that they came to the use of his house, the defendant should be permitted to wage his law. This point was again agitated in the beginning of this reign, when *Brian* held, that law-wager would not lie; saying, that a defendant could never wage his law, unless where of necessity and by common presumption he must have notice of the cause of action (b). In the latter part of this reign, the same question came before the court, in the prior of *Dunstable's* case, when it was held by all the justices, except *Brian*, that law-wager would lie (c). It was there urged, that a man might wage his law, in many cases, on the contract of another. Thus, a lord, if found, on account with his bailiff, to have received more than was due, in debt by the bailiff to recover such surplus, might wage his law, though a stranger to the contract, which in fact commenced with the auditors; the same if the bailiff had been found before auditors to have been in arrear: so in debt brought on a recovery in a court baron. In like manner, in the case at bar, though the prior was a stranger to the contract, yet he was charged by it. It was said, that this is not like the case of executors, who, it is true, are not allowed their law-wager; but that is not for want of privity, but because they are not liable to an action on a contract of the testator. The action against executors is in the *detinet*. This is in the *debet*; for he is not a stranger to the contract, which was made in favour of the house, of which he was the head, but rather a principal party; and if this debt had arisen *tempore vacationis*, it was a settled point

(a) 31 Hen. VI. 23.

(b) 1 Hen. VII. 25.

(c) 31 Hen. VII. 3.

that the new prior might wage his law (a). In an action founded on a statute, it was held, that a defendant should not wage his law (b); though this point of law seems somewhat questioned in another case towards the close of this reign (c).

The chancellor continued in the exercise of that equitable jurisdiction, which had been gradually assumed by his predecessors. Besides questions upon uses, the grand subject of discussion in that court, we find the following points were there considered.

The first case we shall mention is more remarkable for the manner of the judge, than the matter of the inquiry. Two persons were appointed executors, and one released a debt due to the testator, without the assent of his companion. It was suggested in a bill in chancery, brought by the other executor, that the will could not on that account be performed; and therefore a *subpœna* was prayed against the executor, and the person to whom he had made the release. It was there argued, that the plaintiff in equity was without remedy, for every executor has an entire power in himself; and as none could do that which his companion might, the release was good. "But," said the chancellor, "it is against reason, that one executor should have all the goods, and give a release by himself. I know very well that every law should be consistent with the law of God, and that law forbids that an executor should indulge any disposition he may have to waste the goods of the testator; and if he does (says the chancellor with some emphasis), and does not make amends, if he is able, he shall be damned in hell." But, upon the point of equity, he thought there should be a remedy; "for the words of the testament are, *constituo tales esse executores meos, ut ipsi dis-*

(a) 13 Hen. VII. 3.

(b) 10 Hen. VII. 18.

(c) 21 Hen. VII. 14.

“*ponant*, &c. Their power is hereby joint, and not several;
 “and therefore if one does an act without the other, he
 “does it without a warrant. Again, it is *pro salute animæ*
 “*meæ*, &c. and therefore if they dispose it otherwise, they
 “do what they have no authority for. At common law,
 “(says he), if a commission of the peace issues, this gives
 “no jurisdiction to try felons; and if a letter of attorney is
 “given to make livery of one acre, a livery of two is with-
 “out warrant, and void. Now, in this case, the testa-
 “ment is their warrant, and the last declaration of the
 “testator’s will; and should they exceed that, there must
 “be some remedy, as I conceive.” Thus argued the
 chancellor; but the case stood over for further consi-
 deration (a).

Where a cognisee, in a statute merchant, had extend-
 ed the land, and the cognisor sold the land and suffered a
 recovery thereof, it was held, that as he could not falsify
 the recovery, there should be a remedy by *subpœna* for
 the tenant. Again, where an obligation was paid with-
 out a release, and where one was bound to *I. S.* to the
 use of *W. N.* and *I. S.* released the debt, in both these
 cases there was relief by *subpœna* (b). Respecting the pro-
 cess of the court, it was held, that the penal sum in the
subpœna was *in terrorem*; and if it was not obeyed, the
 chancellor might assess a fine upon the party. This assess-
 ment being a judgment, it was held a *sovereign* might
 issue upon it (c).

We next proceed to some questions arising in our cri-
 minal law. Notwithstanding this king’s reign is marked
 by several state-prosecutions, little is to be found in our
 books upon the law of treason: the case of *Humphrey*
Stafford is the only one that is recorded. It was there re-
 solved, that privilege of sanctuary could not be claimed in

(a) 6 Hen. VII. 4 b.

(b) 7 Hen. VII. 41.

(c) 10 Hen. VII. 5. a.

cases of high-treason by prescription, without an original charter before the time of memory, because it so materially touched the king's prerogative; unlike Of treason. a claim to have waifs, strays, and wreck, which might be prescribed for. In the same manner, where a person claimed the goods of felons, outlaws, and cognisance of pleas, he was obliged to shew a royal charter, and allowance in eyre, after time of memory. On the same occasion the judgment of high-treason was pronounced as follows: that he should be carried back to the Tower of London, should be put on a hurdle, and drawn through the middle of the city to Tyburn, and there hanged by the neck; before he was dead his heart should be cut out, his head cut off, and his body divided into four parts, to be at the disposal of the king, and *Deus misereatur animæ ejus, &c. (a).*

The nature of principal and accessory in treason does not seem to have been thoroughly understood, as it was afterwards settled. A man had been attainted of treason in counterfeiting the coin; and another was indicted, *quodd sciens, &c. illum felonice hospitavit, manutenit, et confortavit, &c.* and some doubt arising whether he could be feloniously accessory to the treason, the point was adjourned for the opinion of the court. It was then argued by *Brian*, one of the justices, that he might; for counterfeiting the coin was felony at common law, which felony was not done away by the statute making it treason; and the proclamation on the exigent gave notice, that an outlawry impended both for treason and felony. In truth, every treason implied in it a felony; and therefore, said he, it was clear law, that should any one be attainted of treason on stat. 8 Hen. VI. c. 6 (b). for burning houses, after sending a threatening letter, a man might be indicted, *quodd felonice illum hospitavit, &c.* because burning houses was a felony

(a) 1 Hen. VII. 24

(b) Vid. ant. vol. III. 225.

before. But *Hussey*, the chief-justice, said, that as this was now become treason, there could be no accessory *felonicè*; nor could there be such a thing as accessory *proditoricè*; which seems to have been the better opinion (a).

The distinction between lawful and unlawful acts, was always the governing consideration in imputing guilt or innocence, when a death was occasioned without the intention of the slayer. It was laid down by *Fineux*, chief-justice, that where two played together with sword and buckler, or jousted, and one killed the other, it should be accounted felony; because, though these diversions were suffered by law, yet it was not lawful to use them but at the command of the king. It was clear law, that should one man beat another, without any intention to kill him, and the man died, it was felony, on account of the first act being unlawful; which was a very different accident from that where a man, shooting at a bull, or throwing wood from a house, chanced to kill a man; this being homicide *per infortunium*, by our old law (b). However, in the principal case, it seems that *Fineux* retracted the opinion abovementioned; and in the first year of the next reign laid it down to be felony to kill a man in jousting, or other diversion, notwithstanding the king's command, for such command was illegal (c). It is obvious that the legal opinions on a question like this must, in a great degree, be governed by political considerations, and the humour of the times.

When it was thus positively laid down that the persons so shooting, or throwing wood, were not guilty of felony, it seems reasonable that those passages should not be construed without some qualification, but should be limited in the manner laid down by Bracton (d); namely, if it was

(a) 3 Hen. VII. 10. (b) 11 Hen. VII. 23. Vid. ant. vol. II. 10.

(c) Bro. Coron. 229.

(d) Vid. ant. vol. II. 10.

done in a place not publicly frequented, and the probability was that no danger could ensue: indeed it seems hardly otherwise to be a lawful act (a).

It was no unusual course at this time, in cases of death, where the prosecutor thought it would not turn out to be felony, to lay the indictment as for homicide *se defendendo*, or otherwise, as the real case might be. On an indictment of this kind, and an application in chancery for the usual pardon under the statute of Gloucester (b), some serjeants were of opinion, that there was no need of a pardon, because the justices ought, they said, to discharge the party without an arraignment; and it was only on an indictment for felony, and after the jury had found the defendant guilty *se defendendo*, that the above application was requisite. But the justices thought otherwise; namely, that the indictment should be tried, and on a conviction, a pardon should be had to save the forfeiture (c).

There had been always great tenderness towards infants who had subjected themselves to the penalties of the law by the commission of crimes. The rule, however, that *malitia supplet aetatem*, seemed to be founded on a sensible distinction, and was universally adhered to in after times. A boy of nine years old had killed another of the same age, and confessed the fact; but it was also found, that when he had committed the murder, he hid the body, and made an excuse for the blood upon him, as if it had followed from some accident to himself. This seemed to come within the construction of the above rule, and the justices were of opinion he should be hanged (d). In another case, where two boys were keeping sheep, and one, being between ten and twelve years old, killed the other, and hid the body among the corn, and confessed the whole fact, the execution was respited for the opinion of the

(a) 21 Hen. VII. 39.

(b) Ch. 9. Vid. ant. vol. II. 153.

(c) 4 Hen. VII. 2.

(d) 3 Hen. VII. 1.

justices, greater part of whom thought he should be hanged (a). If a blow was given in one county, and the party died in another, an appeal might be brought in either, and the fact would be tried by a jury of both; but an indictment, in such a case (notwithstanding some *dictums* to the contrary) (b) would lie in neither county, as the jurors have authority only to inquire *pro corpore committatis*, and no more (c).

It has not fallen in our way to say any thing on the crime of arson since the reign of Edward I (d). It was then said to consist in burning the corn or house of another feloniously. After that there is an entire silence in our books as to the nature of this felony. We find, in this reign, that a man was indicted for that he feloniously in the night had burnt a *barn*; and because the barn was adjoining to a house, this was held a felony at common law, and the offender was hanged (e).

Some questions of larceny, similar to the famous one in the time of Edward IV. were again agitated in this reign (f). It was propounded by *Hussey*, who was then chief-justice, whether, if a shepherd took the sheep, or a butler the plate, under his care, it could be called felony; he himself thought it was, and related the case of a butler who was hanged under such circumstances: to which a similar case was added by *Haugh*, of a goldsmith, who had taken some things that were intrusted to his charge. In answer to these, *Brian* argued that it could not be felony, because neither of these persons could be said to take the things *vi et armis*, while he had them under his care: and of this opinion were the justices (g). This was giving a blow to the determination in the time of Edward IV. and expressly contradicted some cases that were

(a) 3 Hen. VII. 12.

(b) 7 Hen. VII. 3.

(c) 4 Hen. VII. 18. 6 Hen. VII. 10.

(d) *Vid.* ant. vol. II. 274.(e) 11 Hen. VII. 1. (f) *Vid.* ant. vol. III. 410. (g) 3 Hen. VII. 12.

there taken for settled law, and argted upon as such; especially that of the butler. However, we find this case of the butler was understood otherwise some years after, and a distinction was taken between the possession a butler has while in the master's house, and the possession of a servant intrusted out of the house. It was propounded by serjeant *Pigot*, in the court of king's bench, to serjeant *Cutler*, in this way: If I bail a bag of silver to my servant to keep, and he goes away with it, can this be felony? *Cutler* said yes; for as long as he is in my house, or with me, that which I have delivered to him is adjudged in my possession: thus if my butler, who has my plate in his custody, runs away with it, this is felony; the same if a person having the care of my horse goes off with it; because in both these cases the thing remained all along in my possession. But if I deliver a horse to my servant to ride to market, and he rides away with it, this is no felony; because he came by the lawful possession of the horse, by delivery out of my custody. The same if I give him a bag to carry to London, or to pay away to some one, or to purchase something; if he goes away with these it would not be felony, because they were out of my possession, and he had lawful possession of them himself. To this *Pigot* assented, adding that he might, in all these cases, have an action of detinue or accompt (a); which idea of possession is consonant to one of the principles laid down in the case so often alluded to. Another case of property and possession was also conformable with an opinion delivered in the foregoing period; namely, that a man who retok his own goods in order to charge the bailée, was guilty of felony (b).

It was common, in an appeal of mayhem, for the defendant to pray an inspection of the mayhem assigned, either by proper surgeons, or by the justices; and the opinion given by either was peremptory, and finally deter-

(a) 21 Hen. VII. 14.

(b) 5 Hen. VII. 18.

mined the cause (a). It seems to have rested with the justices whether they would grant such inspection or not; and if upon examination a doubt arose whether it was a mayhem or not, the justices might compel the party to refer it to the country (b). Upon the occasion of a felon being taken out of the officers' hands as he was leading to execution, it was submitted to the court of king's bench, whether the rescuing a felon was felony or not; and it was held, that such rescuers were principal felons, and not accessories; and it was said to have been so determined in the reign of Edward IV. Such rescue must appear not upon the return of the sheriff, but by an indictment (c).

The question which had been so long agitated, how far the accessory should be favoured by the clergy or other privilege of the principal, was brought forward again in this reign. In the exchequer-chamber, before all the justices, it was debated what should be done where the principal and accessory were arraigned, and both found guilty, and the principal demanded a book before judgment given. *Hussey* was of opinion, that the accessory should have no advantage of this; for if a principal was outlawed, the accessory should be put to answer, though the principal was not attainted of the felony, but only of the contempt; but it was held by all the justices and serjeants, that in this case the accessory should be dismissed. To this the reporter adds, that where the principal confessed the fact, and demanded a book, the accessory should not be arraigned, because no *judgment* was passed against the principal (d). Notwithstanding this, we find in the same year that the common course was to arraign the accessory, and if he was found guilty, he was hanged (e). This point, therefore, still remained to be settled. It was the opinion of the justices of both benches, that an accessory *before* the fact,

(a) 31 Hen. VII. 33. On a former occasion it was thought not to be peremptory. 6 Hen. VII. 1.

(b) *Ibid.* 40.

(c) 1 Hen. VII. 6.

(d) 3 Hen. VII. 8.

(e) *Ibid.* 12.

though acquitted, yet lost his goods, if he fled, the same as the principal felon; but not the accessory *after* the fact (*a*).

It had formerly been made a question (*b*), how far an heir of the appellant might have execution against an appellee, when once convicted at the suit of the appellant. There was still a difference of opinion upon this point; some considering it as an ancestral action, of which the heir could not, consistently with the analogy of legal reasoning, be deprived; others again looking on it as a remedy for a personal injury, which *moritur cum personâ*. Upon a doubt, as in a former case, whether a *scire facias* on such a record would lie against the heir for allowing a pardon, a decision on the principal point was avoided, by determining that the pardon might be allowed without it (*c*). The contrary opinions that had been started at different times, on the admitting a defendant to become a provor, after pleading not guilty, were settled upon the following distinction: that on an indictment he might be admitted, after not guilty, and before verdict, but not on an appeal (*d*).

An alteration took place in the practice of dealing with prisoners who challenged the number of thirty-six jurors. It was the course in the reign of Edward IV. to put such persons to the penance. The same was done in the third year of this king by consent of all the justices, except *Keble*, who said, this being an appeal, was not a case within the statute of Westminster (*e*), which only speaks of the king's suit (*f*). In the same year it was agreed by the justices of both benches, without any distinction between an appeal and indictment, that a man who challenged thirty-six jurors should be hanged, and not put to the penance; and it was resolved that this should be observed as the practice in their circuits (*g*), notwithstanding the contrary usage in former reigns. It was at the same time agreed, that those who confessed a felony, or were outlawed or abjured, or

(*a*) 4 Hen. VII. 18. 110.

(*b*) Vid. ant. vol. III. 414.

(*c*) 9 Hen. VII. 5.

(*d*) 11 Hen. VII. 5.

(*e*) Vid. ant. vol. II. 134.

(*f*) 3 Hen. VII. 2.

(*g*) Ibid. 12.

became provors, should not make their purgation before the ordinary.

We have before seen what the courts decided **Sanctuary.** respecting sanctuary in cases of treason (a). If an offender fled to sanctuary, it was not enough to declare that he came there to save his life, but to add that he had committed felony; though it was not requisite that he should name the special nature of the felony till the coroner came (b). If he did not make such a general declaration, he might, without ceremony, be dragged from thence (c). If he confessed the felony, he would be permitted to remain there forty days, according to the old law. But what is said above seems to be confined to a man taking sanctuary in a church: for there were two manner of sanctuaries; private, as *Westminster Knoll*, and the like; and general sanctuaries, as every church. If a man fled to such a sanctuary as the *Westminster Knoll*, he might remain undisturbed for life; but if he chose to abjure within the forty days, the coroner was to appoint him a day to do it. The law of sanctuary is laid down in a *reading* of this period in the following manner: None shall take sanctuary but *in periculo vite*, as for treason, felony, or the like, and not for debt; for a grant or prescription to have sanctuary for debt was against law, and void. But the reading lays down a strange quibble to evade this; for it admits, that if a man's body was in execution, and he escaped, and came to a sanctuary ordained as a refuge and safeguard for a man's life, he should have benefit thereof, *because by long imprisonment his life might be in jeopardy*. If a church was suspended for bloodshed, he who took it as a sanctuary for felony, should still enjoy it for forty days. It was held that abjuration for felony discharged all felonies done before the abjuration. A man could not abjure for petty larceny, but only for such felonies as induced the pain of death (d).

(a) Vid. ant. 174, 175.

(b) 3 Hen. VII. 12.

(c) Bro. Sanct. 11.

(d) New Cases, 79.

It was the opinion of the judges, that if the ordinary would not permit a clerk to make his purgation, the king might command it by writ (a).

Henry is celebrated by his historian (b) for King and the many excellent laws he caused to be made. government. He was not less attentive to the regular execution of his laws when made. In the first year of his reign, at the close of the parliament, he devised an oath, binding all persons who took it to observe the execution of several statutes. We are told, that not only those of the household, but those of the house of commons, came before the king and lords, and took this oath. After these, the peers, both spiritual and temporal, were asked by the chancellor, whether they were willing to take the oath; who all answering that they were ready, it was read to them; and every lord spiritual laying his right hand on his breast, and every temporal lord on the book of gospels, swore to observe and perform the same. The substance of the oath was, not to harbour felons; not to retain any one by indenture or oath, contrary to the statutes of liveries; not to encourage maintenance, nor embracery, nor riots, nor unlawful assemblies; not to prevent the execution of the king's writs; nor let to bail or mainprize any felons (c).

A precaution like this at once shews the king's solicitude for the due execution of justice, and the protection it needed in times when great men, instead of promoting, had been more used to defeat the effects of it by force and cabal.

It is said, that Henry being entertained at the earl of Oxford's with great state, at his departure expressed astonishment at the number of servants in liveries and badges he saw waiting; but being informed by his host that they were his retainers come to do him honour, he told

(a) 15 Hen. VII. 9.

(b) Lord Bacon.

(c) Parl. Hist. vol. II. 419.

him he would not have his laws broke before his face, and that his attorney must speak with him. It is said the earl paid 15,000 marks as a composition for this offence. In every transaction of this king there is a regard shewn by him to the laws. Though no prince was more jealous of his prerogative, or took greater pains to gratify his love of money, than Henry; yet in all instances where these two grand interests were concerned, he still proceeded under the sanction of law.

In the seventh year of his reign he revived *benevolences*, invented first by Edward IV.; but, more wary than that prince, he did it by consent of parliament, and raised great sums in that way. He strictly enforced all penal statutes which would contribute any thing towards his exchequer: with the same view he caused prosecutions to be instituted on many old and forgotten laws. These legal oppressions, if they may be so called, were carried to a great height in the latter part of his reign, which rendered him extremely unpopular, if not odious; and subjected his two agents in those prosecutions, Empson and Dudley, to a severe account in the subsequent reign.

The new-modelling of the star-chamber fell in with Henry's whole plan. It at once served to secure his prerogative, by enforcing among all ranks of people a strict obedience to the laws; and became a source from whence he was always deriving pecuniary supplies. The penalties in that court used to run very high. It is related, that Sir William Capel, an alderman of London, was fined in 2743*l.* an immense sum in those days! and he was obliged to compound for 1615*l.* This is mentioned only as one instance of these proceedings. Where criminal prosecutions did not produce fines, the king used to make them turn to account, by remitting corporal pains for pecuniary compensations to be paid to himself.

Notwithstanding the bad use sometimes made of severe laws, it cannot be denied that the temper and designs

of Henry contributed to establish the laws in their full force, and to render the administration of justice more regular and effectual. While this had a good influence on the order and peace of society, it levelled all ranks of men under the same submission to lawful authority. The executive magistrate, in the person of Henry, increased in power and distinction; while the nobility sunk below the relative importance they had formerly enjoyed; and the commons continued still in their original imbecility: so that the prerogative of the crown had in this reign an opportunity of aggrandizing itself to a degree much exceeding what it had been in earlier times, though not equal to what it became in the succeeding princes of the line of Tudor.

There are no state trials of this reign now extant; and of these occurrences the chroniclers of the time give very unsatisfactory accounts. It is very uncertain what was the charge against Sir William Stanley, who was executed for a conspiracy, as it is related, against the king.

The method introduced by Richard III. of attainting persons by bill, was pursued by Henry VII. and became henceforward not unfrequently resorted to, where it was thought the common law could not effectually reach an offender.

The legal monuments of this reign are the statutes, judicial records, and reports. The statutes underwent no farther alteration in the manner of forming them in parliament. The records are from this period, almost in a regular series, kept with order, and in good preservation; as may be seen in the repositories of the courts of king's bench and common-pleas, in Westminster-Hall. The reports are the *Year-book*, with some cases in the collectors *Jenkins* and *Benloe's* but more particularly in *Keilway*, who lived at this time, and took them himself. The *Year-book* of this reign, as it goes more into points of law, and such matters of learning as have survived the times

when they were debated, is more deserving attention than the preceding. We find the counsel and judges sometimes quoting cases; and Bracton is once or twice referred to^(a); but this was not common: their determinations were mostly the result of argument and discussion, and these were made precedents for future ages.

There are no law-treatises of this reign in print. But there is a famous book, said to be still in manuscript, written by *Marrow*, on the office of a justice of peace; a work which has been quoted by later writers, such as Fitzherbert and Lambard, with great commendation, and seems to have been followed by them on the same subject. Though this reign was so barren in original works, they were not backward in putting to the press the productions of former times.

The art of printing began to give further assistance to the study of the law, than it had in the former period. Caxton went off the stage in 1491: we hear no more of Lettou and Machlinia. Wynkyn de Worde took the lead till 1497; when Richard Pynson entered into competition with him, as did Julian Notary in 1498, William Faques in 1504, and afterwards Henry Pepwell; though the career of the last three did not extend much beyond the present reign, as did that of Pynson and de Worde. Faques, and afterwards Pynson, had attained a distinction which Wynkyn de Worde seems never to have enjoyed; they were successively (and as some think jointly) king's printers. But this appointment seems to have conferred no exclusive right of printing law-books, for the statutes continued to be printed by Wynkyn de Worde, and other printers: this appointment is thought not to have been by patent, but by sign-manual.

The several statutes passed in this reign were printed soon after they came out by de Worde, by Pynson, and by Faques; and some were repeatedly reprinted by all of

(a) 1 Hen. VII. 6. b.

them. We have before intimated, that some statutes ascribed to Caxton most probably belonged to a later period, and may perhaps have been printed in this reign. There appears a collection of the statutes, under the title of *Nova Statuta*, beginning with 1 Ed. III. and ending with 12 Hen. VII. This is printed by Pynson, and is ascribed to the year 1497, just after the close of that parliament: it is however certain, that it was printed before 19 Hen. VII. as it would otherwise have contained the statutes of that session (a).

It is remarkable, that the latest and most accurate inquirers into our typographical antiquities do not precisely fix the printing of any Year-book to the reign of this king. We have before taken upon us to say, that certain years of Henry VI. were printed about the years 1480 and 1483. A writer (b) of some learning, but famous for misrepresentation, has advanced, that Wynkyn de Worde was the first who began to print the Year-books; and that he and Pynson printed above forty of them, which were to be found among the *libri manuscripti* in Lincoln's-inn library; but upon search, none such have been found. Mr. Ames, a more faithful inquirer, informs us, that he never met with any Year-book bearing the name of Wynkyn de Worde, either alone or in conjunction with Pynson; but that he had seen two, being 17 and 18 Ed. III. without a printer's name or date, which he thought were printed with the same type as Fitzherbert's Abridgment, in 1516; and which he makes no question were printed by de Worde in the subsequent reign. It is agreed that Pynson printed many Year-books; but it is still left to the probability of the thing, whether he, any more than de Worde, printed any during this reign (c). It seems most probable, that twenty-four years would not be suffered to pass without some

(a) Typog. Antiq. 141. 144. 204. 206. 218. 283.

(b) Psalmanazar.

(c) Typog. Antiq. 235.

- addition being made to the stock of Year-books, which we have before seen were printed in the time of Edward IV. or Richard III. In general, the time of printing the Year-books seems to be less ascertained than that of most other of our early-printed books, owing to their being mostly printed without a date.

Whatever doubt there may be about the time of printing our books of common law, there seems none about those of the ecclesiastical law. The edition of Lyndwood's *Provinciale*, before-mentioned (*a*), is ascribed to Wynkyn de Worde, and is thought to have been printed in 1496. The great demand for this authentic canonist requiring a further supply, the same printer gave another edition in 1499, in octavo; and we find two others in 1505 (*b*); one of them at Paris, supposed to be printed from an impression made at Oxford.

Miscellaneous facts. We find another increase in the judges salaries. Sir William Hussey, appointed chief-justice of the court of king's bench in the 1 Hen. VII. had the yearly fee of one hundred and forty marks granted to him for his better support; further, he had one hundred and six shillings and eleven-pence farthing and the sixth part of a halfpenny (such is the accuracy of our author and the strangeness of the sum) for his winter robes, and sixty-six shillings and sixpence for his robe at Whitsuntide (*c*).

An act of the Irish parliament made in this reign, as it communicated to that kingdom a participation of our laws in a more full manner than it before enjoyed them, may be considered as an interesting fact in the History of the English Law. Amongst other statutes made under the government of sir Edward Poynings in 10 Hen. VII. and therefore called Poynings' Laws, there is one which enacts (*d*), that all acts of parliament made in England be-

(*a*) Vid. ant. 119. (*b*) Typog. Antiq. 125. 135. 312. (*c*) Dudg. Orig. 110.
(*d*) Chap. 23. Irish Statutes.

fore that period shall be in force within the realm of Ireland. The extending of the dominion of the English law by an act of that legislature, contributed to connect these two kingdoms in the strictest bonds of union ; that of similar laws, and a similar constitution ; the grounds and great outlines of which it was thought would ever be preserved alike in both by the appeal which had long been made from the courts of that country to the courts here, notwithstanding the differences that must by degrees arise from the regulations of a distinct parliament providing for the exigencies of a distinct people.

There was another provision of the Irish parliament, which seemed to promise, that the law of that country would not be permitted to deviate from the model communicated by the parent-state. An act had been made by chap. 4. of the same statute to the following effect : That before a parliament be summoned or holden, the chief governor of Ireland should certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts to be proposed therein : That after the king in his English council should have considered, approved, and altered the said acts, and certified them back under the great seal of England, and given licence to summon and hold a parliament, then the same might be summoned and held ; and therein the acts so certified, and no other, should be proposed and received, or rejected. This mode underwent further alteration in after-times.

The statutes which contain the multitude of objects above alluded to, must necessarily fill a considerable space, and would unavoidably require a great portion of the subsequent History. But a style of composition in framing statutes began now to obtain, which swelled their size beyond all example of former times. This consisted partly in the matter and substance of them, and partly in the manner and form. Every parliamentary regulation was accompanied by a minute detail of particulars, and an accumulation of provisos, exceptions, and qualifications: these were conveyed in a diffuse and redundant language, crowded with synonymous terms and tedious repetitions. A regulation which in the reign of Edward I. would have been comprised in a few lines, was now spun out into as many clauses: so that the statutes of this single reign actually cover as much paper as all those preceding it, up to *Magna Charta*. The same fashion prevailing, those of the two subsequent reigns increased in the like proportion(a).

With this prospect before us, it becomes necessary to adopt some rule by which we may abridge and simplify our materials, without doing any injury to the subject of our History. Many of these statutes are directed to concerns not at all of a juridical kind, and may therefore, as it should seem, be passed over in silence. Those that were of short duration, either because they were soon repealed, or were at first but temporary, may be treated more or less at large, according as they seem to deserve a place in our historical investigation: the remainder are such as had an extensive and permanent effect, and therefore are intitled to be detailed with all the minuteness which the compass of this work will allow. But even these, for the reasons abovementioned, must sometimes, and may in general with great propriety, be somewhat curtailed. It will very

(a) In the edition of the statutes that usually goes under the name of Rastall,—the reign of Henry VII. ends at pa. 390; that of Henry VIII. at pa. 903; and that of Philip and Mary at pa. 1900.

often suffice for the purpose of this inquiry, to state the substance and effect of a statute, without following the identical words, or enumerating every provision it contains. By means of such abbreviation, the legislative acts of this reign may be contracted into a narrative of moderate length, neither impeded nor embarrassed with the irksome formality of the materials from which it is collected. While the historian amuses himself with the one, the other will be left for the more authentic information of the practitioner.

Under the controul of the above method we shall now take a view of the statutes of this king, in the following order. Those claim our first notice which tend to give strength to the political system, and vigour to the sovereign power; such are those for regulating the legal polity of Wales, and abrogating all franchises exercised independent of the crown. Next to these should follow such statutes as affected the parliament. The next are such as produced the abolition of papal usurpations, and wrought a reformation in our ecclesiastical constitution: then the laws that concerned the civil state: after these will naturally follow the laws relating to private property, and the administration of justice: and, lastly, those relating to our criminal law. This is the order in which we intend to speak of parliamentary provisions during this reign.

Of the first kind are the statutes concerning ^{Of judicature} Wales. At the time when the parliament came ^{in Wales.} to the resolution of introducing a more complete system of laws and administration of justice into Wales, the judicial establishment there seems to have been of the following kind: From the time of Edward I. the English law had prevailed to a certain degree, and had at length in general obtained the ascendant, in the government of property and the punishment of offenders; but this was always mixed with their local customs: to these they adhered with great predilection; and they were encouraged in this partiality by the number of petty jurisdictions into which the country was

divided. The administration of justice in a great part of Wales was in the hands of the lords marchers, each of whom exercised a kind of feudal sovereignty within his district, and became accordingly, in the person of his steward, the judge, with a full enjoyment of all the casualties of judicature; such as fees, fines, amercements, and forfeitures. These casualties, probably, the lords possessed in a greater or less extent, according to the nature of their franchise; some being the king's lords marchers; others being lords marchers, in a manner, independent (a).

Besides the variety of laws and usages, that must follow from so many distinct tribunals; they were likewise productive of disorders in the police, from defects of justice, owing to neglect, collusion, or the clashing of different jurisdictions. It was to remedy this, and to strengthen the royal authority over the principality, that a *president and council* had been lately appointed under a commission from the king. These constituted a court, and seem to have maintained a kind of pre-eminence and superintendant authority over the other judicatures of the country; but the whole of their power and authority does not exactly appear. Another support of the king's sovereignty consisted in the justices by him appointed. There was, and had been in very early times, a justice of *Chester* (b), whose jurisdiction comprehended the county of *Flint*; there was also the king's justice of *North Wales*, whose jurisdiction included *Anglesey*, *Carnarvon*, and *Merioneth*; and the justice of *South Wales*, which included *Carmarthen*, *Pembroke*, *Cardigan*, and *Glamorgan* (c); the remainder of Wales being then not divided into counties, but under the government of the lords marchers, as before mentioned. Where justice was administered by judges appointed from the king, it cannot be doubted

(a) Vid. ant. vol. II. 94, 95, and stat. 26 Hen. VIII. c. 6. sect. L.

(b) Vid. ant. vol. II. 96.

(c) Stat. 27 Hen. VIII. c. 5.

but the English law was pretty generally known and observed. The judicial arrangement in North Wales seems to have been tolerably well adjusted; for in the course of the settlement now about to be made, that is always referred to as the model by which this institution was to be framed, and the guide by which many of its operations were to be governed. Such was the state of the legal polity in Wales in the 26th year of this king, when the first statute was made for reforming it.

The statute of 26 Hen. VIII. c. 4. was made to prevent the friends and kindred of criminals from labouring, and suborning jurors. It is thereby directed, that the officer of the court for the due keeping of the jury should not suffer them to eat or drink, or any one to speak to them. There is a very remarkable clause in this act, which ordains, that if the jurors acquitted a felon, *contrary to good and pregnant evidence*, or otherwise misbehaved themselves, the judge might compel them, upon pain of imprisonment, to be bound by recognizance to appear before the president and council, and abide the decision of that tribunal on their conduct. The president and council might imprison or fine them at their discretion; an authority which had been exercised by judges in England (a) without the sanction of an act of parliament, but not without great murmuring; and it was not till long after this that a solemn determination was pronounced against the legality of such procedure (b).

This is followed by an act, in the same sessions (c), containing provisions very similar to those made in the earlier times of our history; which shews the influence of laws at that time in Wales to have been much what they were in England in the reigns of Henry III. and the beginning of Edward I. After complaining of the great

(a) Vid. ant. vol. III. 105. (b) In Charles II.'s reign. (c) Chap. 6.

disorders prevailing in the principality, owing to the disobedience of the law, it directs all persons, upon monition given, to be attendant at the courts of justice, under certain penalties and forfeitures; none were to appear within two miles of the session or court with any kind of weapon or armour, upon pain of imprisonment and fine; and all courts were to be kept in the *most sure and peaceable place* that could be chosen (*a*). To give redress against the oppressions of lords marchers, they and their stewards or officers were made liable to be fined by the president and council, for unjust imprisonment of any one within their district. To be sure of the execution of the law against the worst offenders, it was enacted, that coining, murder, and other felonies, should be tried in the next English county (*b*); and an acquittal or *fine-making* in any lordship should be no bar, if the prosecution in the English county was brought within two years (*c*). But the justices might discharge such offender, if convicted, upon his finding sureties not to commit any felony, and to be of good behaviour: this was to be with the consent of the president and council; it was to be only once, and then not without paying a fine. This custom of *fine-making* had been very ancient in Wales, being the remains of the old jurisprudence of the country; and the parliament were tender in abrogating an indulgent law, which was supported by the prejudices of the people, when they thought it might be put under some wholesome restriction.

In the same sessions two laws were made for correcting disorders in Wales (*d*); one, to punish those who assaulted and beat people, and then took refuge within the boundaries of neighbouring lordships; the (*e*) other, to introduce there the late regulations concerning clerks convict. In the following sessions some provisions were made of

(*a*) Sect. 4 and 6. (*b*) Sect. 6. (*c*) Sect. 7. (*d*) Ch. 11. (*e*) Ch. 12.

greater importance than any of the preceding: these were by stat. 27 Hen. VIII. c. 5, 7, and 26. The first of these statutes was designed to enforce obedience to the criminal law; and it authorized the chancellor to appoint justices of the peace, justices of the *quorum*, and justices of gaol-delivery in Chester and Flintshire, and in the counties of North and South Wales; with the same power to execute the law, as the same magistrates had in England. The second was occasioned by some abuses prevailing in forests in Wales; such as a custom for foresters to exact fines, on various pretences, of persons going through the forest, and other exactions of the like kind; all which were thereby abolished.

Before we take notice of the third act made in this sessions concerning Wales, it will be proper to mention one which stands before it in the statute-book, and which made a part of the same plan for rendering the process of law more effectual, by placing every judicature in the kingdom in the hands of the king. This Of counties palatine was the act for taking from counties palatine palatine the prerogatives which had long been annexed to them, in derogation of the sovereign authority of the king: it is stat. 27 Hen. VIII. c. 24. and is intitled, "An Act for recontinuing Liberties in the Crown;" importing, as the preamble states, that "divers of the most ancient prerogatives and authorities of justice appertaining to the imperial crown of the realm had been severed from it by the gift of the king's progenitors, to the detriment of the royal estate, and the delay of justice." For reformation of this, it was thereby ordained, that, for the future, no person shall have authority to pardon offences committed in any part of the realm or in Wales, or the marches thereof; but that "the king shall have the whole and sole power and authority thereof, united and knit to the imperial crown of this realm, as of good

right and equity it appertaineth ;" and none but he alone was ever after to appoint justices in eyre, of assise, of the peace, or of gaol-delivery; in all shires, counties palatine, and all other places in England, Wales, and the marches thereof.

All writs and indictments were for the future to allege facts as done against the king's peace, and were to be in the king's name; only they were to be *tested* in the name of the person who had the county palatine or franchise; and justices appointed in the county palatine of Lancaster were to have their commission under the seal of Lancaster.

There was a provision in this act in favour of some of these liberties. The justice of *Chester* and *Flint* was excepted out of every alteration made, by this statute(a), and was therefore to exercise his authority according to the commission he before received: The bishop of Ely and his temporal steward of the isle of Ely; the bishop of Durham and his temporal chancellor of the county palatine of Durham; the archbishop of York and his temporal chancellor of the shire and liberty of Hexam, were to be justices of the peace within their several liberties, with all the authority annexed to the office of such magistrates.

Thus were all the prerogatives enjoyed by these petty sovereigns resumed, and re-annexed to the crown; while the form of their judicial establishment still remains.

After the regulations made by this act; a way was opened for a more complete reformation in the judicature of Wales; which was now undertaken on a larger scale, by chap. 26. of the same statute. It is thereby, in the first place, ordained, that the dominion of Wales should for ever be incorporated with, and annexed to, the

(a) Sect. 18.

realm of England; that persons born there should enjoy all the privileges and laws of this kingdom, as natural-born subjects; that lands should be inherited after the English tenure, without partition; and, finally, that all the laws, ordinances, and statutes of England, and no other, should be executed in Wales, in such manner as directed by that act. To insure the due administration of these new laws, it was enacted, that certain lordships marchers should be annexed to certain English and Welch counties; and that the residue should be divided into counties, under the names of *Monmouth*, *Brecknock*, *Radnor*, *Montgomery*, and *Denbigh*; the first to be taken as an English, the rest as Welch counties (*a*); and a commission was to be appointed for dividing these new counties into hundreds, and for settling the divisions of some others. It was further directed, that justice should be administered in these new Welch counties, and in *Carmarthen*, *Pembroke*, *Cardigan*, and *Glamorgan*, according to the English law, by such justices as the king should appoint, and in such form and fashion as it then was and had been used in the three counties of North Wales (namely, *Anglesea*, *Carnarvon*, and *Merioneth*); which we have seen was an old establishment, and was now the original, according to which the new arrangement was adjusted.

It was further directed, that all courts should be proclaimed and kept in the English tongue: all oaths, verdicts, and the like, were to be in English; and no person was to have any office who did not understand English. A saving was made of a moiety of forfeitures and fees to lords marchers, as well as all courts leet, barons, waifs, strays, and other casualties and fruits of seignory. There was a saving of usages and customs then prevailing in North Wales; and notwithstanding what had been declared to the contrary in the former part of the act, it

(a) Sect. 3.

was provided, that lands which had been by custom time out of mind partible among the heirs, should so continue (a). To ascertain what the customs and laws obtaining in Wales were, a commission was to be appointed to make enquiry concerning them; and such as should be thought by the king and his council proper to be retained, were to be continued in full force and effect (b). In aid of this provision, it was also declared, that the king should have power for three years to suspend, abrogate, or alter this act (c); and for the next five years, to erect such courts and appoint such justices within the principality as he should think fit: so that a final and perfect establishment of the judicial polity of Wales was reserved for some future settlement, which was then in contemplation.

This was accomplished by stat. 34 and 35 Hen. VIII. c. 26. which is intitled, "An Act for certain Ordinances in Wales;" and contains the whole constitution of the principality, its laws and judicature. The provisions of this act are said to have been granted at the humble suit and petition of the king's subjects in Wales. It declares, that Wales, consistent with the late revolution effected there, should consist of twelve counties; the eight ancient counties, that is, *Glamorgan, Carmarthen, Pembroke, Cardigan, Flint, Carnarvon, Anglesea, and Merioneth*; and the four new ones, that is, *Radnor, Brecknock, Montgomery, and Denbigh*; and that the limitations of hundreds, as settled by the commissioners appointed according to the late act, should be observed.

As to the judicature of the country, it directs, that there should continue a president and council, as before; that a sessions, to be called *The king's great sessions in Wales*, shall be held twice a-year in every county (d); that this court shall hold pleas of the crown in as ample manner as the king's bench; and pleas real, personal, and

) Sect. 35. (b) Ibid. 27. (c) Ibid. 36. (d) Ibid. 4, 5, 6, 7, 8, 9.

mixed, as completely as the common-pleas in England(a). The detail of regulations made by this act may be stated briefly, as follow: The sessions is to last six days. Days are to be given from day to day, and from sessions to sessions, at the discretion of the justices. There is to be an original and judicial seal (for the different circuits), to seal all original and judicial writs and process; the *teste* of every bill and judicial process to be under the names of the justices. All actions, real and mixed, are to be by original. Personal actions above forty shillings may be either by original or by bill; those under are to be always by bill. Original bills are to be sealed with the judicial seal. Fines of land with proclamations levied before justices there, are to be of the same force as fines in the common-pleas (b). Errors of judgments before the great sessions in pleas real and mixed, are to be brought by writ of error into the king's bench in England; in pleas personal, to be reformed by bills before the president and council(c). No execution to be stayed by writ of false judgment; but in case the judgment is reversed, restitution is to be made(d). When there are many personal actions which cannot be tried at the great sessions, it was ordained, that, for dispatch, they may be heard at a petty sessions before the deputy justices there; and further, that no suit shall be prosecuted by bill before the said justices, under twenty shillings(e). The fees of officers, for the execution of process and drawing the proceedings, were fixed by the statute, with authority, however, to the justices to alter them at their discretion.

Besides the superior magistrates, the president and council, and the justices of sessions, there were to be justices of the peace in every county(f); their number and qualifications were set forth(g); and direction was

(a) Sect. 12. (b) Ibid. 33, 34, 35, 41. (c) Ibid. 113. (d) Ibid. 114.

(e) Ibid. 94. (f) Ibid. 53. (g) Ibid. 55, 56.

given for the due holding of inferior tribunals, as the sheriff's county court and tourn, with courts baron and other courts (a).

In addition to the appointment of magistrates, and prescribing the bounds of their jurisdiction, several rules were laid down respecting the law of crimes and of property. It was ordained, that no felon should be permitted to make fine (as they before had done, according to the usage of the country, confirmed in some measure by the late act) (b), but should suffer the law, unless reprieved by the judge (c). The stat. 26 Hen. VIII. c. 6. concerning the trial of crimes and felons in the next English county, was confirmed; but by another clause of this act (d), it is declared, that if any murder or felony is committed, no one, upon pain of fine and imprisonment, shall make an end or agreement with the offender, unless he make the president or council, or one of the justices, privy thereto; a provision which evidently allowed a continuance of this practice.

It was ordained, that trials in the county, baron, and hundred courts, should be by wager of law, or verdict of six men, at the pleasure of the party who pleaded the plea (e). In other courts, in actions personal, where nine of the jury were sworn, the sheriff may, upon default of the rest, fill it up by a *tales de circumstantibus* (f). In foreign pleas triable in another Welch county, a transcript of the record is to be sent thither; but if the matter of such pleas is laid in an English county, it is, nevertheless, to be tried in Wales (g).

The following are the provisions relating to property. It was now finally enacted, that lands should not be partible among the heirs (h), as in *Gavelkind*; but should descend, as in English tenures. No mortgage is to be allowed but

(a) Sect. 73. 75. (b) Vid. ant. 196. (c) Sect. 84. (d) Ibid. 100.
(e) Ibid. 84. (f) Ibid. 103. (g) Ibid. 88, 89. (h) Ibid. 91.

according to the course of the English law (a); all persons may sell and alien their lands, the same as in England (b); and lands there are to be subject to statutes staple, and recognisances acknowledged in England (c). No sale of goods in any fair or market is to change the property (d); nor is any person to buy live cattle, unless it is proved by witnesses where it was bought; and this is to be observed under pain of a fine.

Notwithstanding so extensive and complete a judicature was established within the principality, there was a clause in this act which provided for the introduction of process from the superior courts, on certain occasions. It was ordained, that, "for urgent and weighty causes," process should be made and directed into Wales by the special commandment of the chancellor, or any of the king's council, as had been used before (e). There was a reservation to the king of a power similar to that given by a former statute relating to the administration of justice in Wales, by which he was enabled, in writing under the great seal, to change, add, alter, order, diminish, and reform, all the beforementioned provisions, as it should seem convenient; and from time to time, at his pleasure, to make laws for the government of Wales (f).

Thus far of those provisions made by parliament for maintaining the political authority of ^{Of parliament.} the sovereign. The legislature made some acts respecting its own conduct and constitution. The first of these was passed at the close of a session, with the necessity of such a provision, no doubt, plainly before their eyes. It was enacted by stat. 6 Hen. VIII. c. 16. in consideration of the many weighty matters which were often left to the end of a session, that no member depart nor absent himself till the parliament was fully finished, ended, or prorogued, unless

(a) Sect. 92.

(b) Ibid. 93.

(c) Ibid. 94, 95.

(d) Ibid. 101.

(e) Ibid. 115.

(f) Ibid. 119.

he had licence from the speaker and commons, which licence was to be entered on record in the book of the clerk of the parliament: if any did otherwise, he was to lose his wages, and the inhabitants of the county, city, or borough, should be discharged thereof.

In order to communicate to Wales all the privileges enjoyed by English subjects, it was ordained by stat. 27 Hen. VIII. c. 26. that two knights should be chosen for the county, and one burgess for the town of Monmouth; that one knight should be chosen for the county of Brecknock, Radnor, Montgomery, and Denbigh, and for every other county in Wales; and one burgess for every shire town, except Merioneth. These elections were to be as in England, with the same fees and allowances.

The next statute on this head was for imparting the privilege of being represented in parliament to the county palatine of Chester. The preamble of stat. 34 and 35 Hen. VIII. c. 13. states, that the inhabitants of the county palatine complained of suffering in their property from severe laws, which they attributed to their bearing no part in the making of them. To satisfy the inhabitants, it was therefore enacted, that there should be two knights for the county, and two burgesses for the city, to be elected by process issued by the chancellor of England to the chamberlain of Chester, his lieutenant, or deputy, and from him to the sheriff of the county; which elections and returns by the sheriff were to be the same as those in the county palatine of Lancaster, and the rest of England (a).

There was a statute for better ordering the collection of the wages of knights and burgesses in Wales and

(a) There is another provision in this act, which, though relating to another subject, is worth notice. It was a practice in the county palatine for a person indebted to another to come to the exchequer there, and make oath that he would pay his creditors as soon as he was able; upon which the officers used, of their own authority, to issue a writ in nature of a protection, and to delay the creditors from making any demand of their debts. It was now ordained, that no such writ should issue without special warrant from the king.

Monmouth. It seems that the wages of a knight was now four shillings a-day, that of a burgess two shillings, and it continued from their setting out to their return home, with the costs of their writs, and other fees and charges. There were two writs; one, *de solutione fædi militis parliamenti*; and another, *de solutione fædi burgensis parliamenti*. These used to be sued out by the member; and by this act the sheriff, mayor, or other head-officer, was to make his payment within two months after such writ delivered to him (a).

The laws relating to the national church, and ^{Of the ecclesi-}the ecclesiastical polity, make the most remarkable part of the legislative acts during this reign. The attack upon the papal authority, and the reformation of abuses among the clergy, was carried on by fits, as the king's humour directed him; and they fill, on that account, a multiplicity of statutes. To arrange these in some order, and to preserve, at the same time, a kind of history of this famous revolution in the church, will be attended with difficulties. These acts are of different sorts, and had different objects: some were designed to demolish the ancient fabric; and others to lay the foundation of a new one: some concerned the papal authority solely; others applied to matters of domestic regulation. It follows, that many of these statutes being now *functa officio*, are sunk into oblivion; while those which furnished the basis of our present establishment in the church, are generally known. Perhaps the most satisfactory way of treating the one, would be to give also a detail of the other. We shall, therefore, take a view of the statutes that relate, in any way whatever, to the church and ecclesiastical law, as nearly in the order in which they were made as the subject will permit. This will form a sort of juridical narrative of the Reformation, interrupted sometimes and retarded by the recital of regulations either directly or incidentally appertaining thereto, and which the nature of this work requires should be somewhat fully enlarged upon.

(a) Stat. 35 Hen. VIII. c. 11.

After the disgrace of Cardinal Wolsey, and while the affair of the king's marriage was depending, in the 21st year of this reign (*a*), a parliament was called, when three bills were sent up from the commons, levelled at some of the most exorbitant abuses of the clergy: one was against unreasonable exaction of fees for the probate of wills; another was for regulation of mortuaries; another was to restrain pluralities and non-residence, and to forbid the clergy taking farms.

Fees of ordinaries.

We have before seen what provision had been made by parliament, and by provincial constitutions, for preventing extortion and imposition in the article of fees for probate and administration. Abuses, however, seem still to have maintained their ground (*b*). The stat. 21 Hen. VIII. c. 5. complains of the impositions practised by ordinaries, notwithstanding two former statutes made to ascertain their fees, namely, stat. 31 Ed. III. stat. 1. c. 4. and stat. 3 Hen. V. c. 8. (*c*); and it enacts, that nothing shall be taken for probate of a will, and making inventories, where the goods do not exceed five pounds, except 6*d*. to the clerk; where they do not exceed 40*l*. not more than 3*s*. 6*d*.; and where they exceed that, 5*s*. Thus far of testaments. It ordains, with more precision than the statute of Edward III. who shall be intitled to the administration, in case of intestacy: it directs, that it shall be granted *to the widow of the deceased, or to the next of his kin, or to both, as the ordinary in his discretion shall think good.* The same rule is to be observed where executors refuse to prove the will, and the execution of it is to be committed to the relations. The ordinary is also empowered to make his election between two or more who are of equal degree of kindred (*d*); nor is any thing to be taken for such administration by the ordinary, unless the goods amount to more

(*a*) An. 1529.
and vol. III. 256.

(*b*) Vid. ant. 67, 68.
(*d*) Sect. 3, 4.

(*c*) Vid. ant. vol. II. 386;

than 5*l.*; and then if they do not exceed 40*l.* he is to take only 2*s.* 6*d.*

Executors and administrators are to give security for a due administration (*a*); and, taking two of the legatees, or two creditors, or, in default of them, two of the next of kin, they are to make an inventory of the effects. All persons offending are to forfeit as much as the money taken contrary to this act; and, besides, 10*l.* half to the king, and half to the party aggrieved. The act further ordains, that lands being devised to be sold, the money thence arising, or the profits of the lands, shall not be considered among the goods and chattels of the deceased. So that many persons who had property of some value, might in those days, when personalty was in general not large, come within the privileges above allowed to those who had not 5*l.* in goods.

Mortuaries, or *corse-presents*, were a customary due claimed by the parson in many places upon the death of any body. Stat. 21 Hen. VIII. c. 6. puts some restraint upon these demands; and ordains, that none shall be taken where the moveable goods of the deceased are under ten marks; and where they are under 30*l.* after all debts paid, not more than 3*s.* 4*d.* is to be taken, and in no case more than 10*s.* Mortuaries were hereafter not to be taken on the death of a way-faring man, feme-covert, child, or person not keeping house; and they were entirely abolished in Wales.

These provisions had a more general effect than those that follow; for while they restrained the clergy from raising sums on the people in certain fees and dues, the following act only confines the clergy to a due discharge of their function, by forbidding, under penalties, all other avocations. The stat. 21 Hen. VIII. c. 13. was made, as it says, among other reasons, for "the increase of devotion and good opinion of the lay fee toward the spiritual persons." It accordingly ordains, in the first place, that

(a) Sect. 4.

no spiritual persons shall take lands to farm under pain of forfeiting 10*l.* per month. This, however, does not extend to the farming of any temporalities during the vacation of bishoprics, or collegiate or cathedral churches; and any persons (a) not having sufficient glebe, may rent lands for the mere expences of their household. Moreover, no spiritual persons are to buy or sell for profit any kind of merchandize, upon pain of forfeiting the thing so bargained, and of the contract being void; with an exception where they sell the overplus that remains of any corn, cattle, or the like, after the supply of their families. No spiritual person is to keep a tan or brewhouse, under the penalty of forfeiting 10*l.* per month (b).

Residence and pluralities. These regulations were designed to remove the clergy from mean and gainful occupations, and to fix their attention solely to their spiritual calling. That this might be discharged with faithfulness, the next step was to put pluralities and non-residence under some restraint. Repeated provisions had been made by councils, and by our own provincial synods, to prevent plurality of benefices; but the force of these had been weakened by the interposition of papal dispensations (c). In confirmation of the design of such provisions, and to shorten the hand of the pope, it was now enacted, that if any one having a benefice with cure of 8*l.* per ann. or above, accept of another with cure, and be instituted and inducted, the first shall be adjudged vacant, and the patron intitled to present. All dispensations from Rome, or elsewhere, contrary to this act, are declared void, and the procurers thereof subjected to the penalty of 20*l.* Only such spiritual men as are of the king's council may purchase a dispensation to hold three benefices; and the following persons to hold two: the chaplains of the king, queen, prince, or princess, or any of the king's children,

(a) Sect. 7, 8.

(b) Ibid. 32.

(c) Lynd. lib. 3. tit. 5. c. 2. Ayl. Parerg. Jur. Can. 414.

brothers, uncles, or aunts; of all lords spiritual and temporal, and peeresses; the chaplains to the chancellor, treasurer, and comptroller, secretary of state, dean of the chapel, almoner, master of the rolls, the chief justice of the king's bench, the warden of the cinque ports; as also, the brothers and sons of temporal lords and knights, doctors and bachelors of divinity and law, being admitted such by the university, and not by grace only.

The papal canon law and our own constitutions had not been more strict on the article of pluralities, than that of residence; but the interposition of the legislature was deemed as necessary in the latter case as in the former. The present statute directs, that every one promoted to an archdeaconry, deanry, or dignity, in any cathedral or collegiate church, or beneficed with a parsonage or vicarage, shall be personally resident on one of them at least; and if he absent himself for one month together, or two months at several times in one year, he shall forfeit 10*l.* for every default, with a penalty on those who procured dispensations from Rome, as in the case of pluralities: a similar exception was made in favour of the following persons: those in the king's service beyond sea; scholars residing at any university for study; chaplains to the king or any of the royal family, and lords spiritual and temporal and peeresses; the chaplain of the chancellor; treasurer of England; the chamberlain and steward of the household, treasurer and comptroller; knights of the garter; chief justice of the king's bench (and by stat. 25 Hen. VIII. c. 16. all the judges of that court, and of the common-pleas, the chancellor and chief baron of the exchequer, and the attorney and solicitor-general; and by stat. 33 Hen. VIII. c. 28. the chancellor of the duchy of Lancaster (a), and the groom of the stole); warden of the ports;

(a) By the same act this privilege was given to some great officers of the courts erected since the former acts, namely, the chancellor of the court of augmentations, the chancellor of the court of first-fruits and tenths; the

master of the rolls; secretary; dean of the chapel; almoner; such chaplains being attending and dwelling without fraud or covin in the households of the above personages. The following persons were also excepted, being in those days usually ecclesiastics: the master of the rolls; dean of the arches; the chancellor or commissary of any bishop; such of the twelve masters in chancery, and twelve advocates of the arches, as were spiritual men. The king is permitted to give licence of non-residence to his chaplains; which seems to be only a confirmation of the common law; for the king's clerks were never bound to residence, and there was an old writ *de non residentia clerici regis* (a).

There was a clause that forbid a beneficed person taking a parsonage or vicarage in farm, or any profit or rent out of it, upon pain of forfeiting 40s. for every week, and ten times the value of the profit or rent; and the like penalty of 40s. for every week that he received any stipend or salary to sing for a departed soul (b).

The temporal lords were earnest in passing these three bills, and the spirituality as strongly opposed them. It was said, that complaints of abuses and pretended reformations were set on foot only to disgrace the clergy, and were the ordinary beginnings of heresy. The clergy without doors were equally clamorous against them; while the acts were, on the other hand, secretly promoted by the king.

Though the latter statute affected the pope's authority in matter of pluralities, non-residence, and dispensations; yet this, and the whole of these three acts were rather regulations of a domestic nature, than such as could be considered in the light of attacks on the papal jurisdiction. However, they

master of the wards and liveries; each of the general surveyors of the king's lands; the treasurer of the court of augmentations. The chaplains of persons mentioned in this act were to go twice a-year to their benefice, and there reside eight days, or forfeit forty shillings for every neglect.

(a) Vid. ant. vol. II. 293.

(b) Sect. 30.

shewed the pope what the king meant to do, if he went on to offend him, and how readily the parliament would give their concurrence. The clergy suffered a severe blow by these laws; for they not only felt an immediate restraint, and lost a present profit, but a door was opened for the many mortifying regulations which soon followed (a).

These begun to appear in two years; for, after stat. 23 Hen. VIII. c. 9. which provided against citing any person out of the diocese where he resided, except in cases of prerogative-administration in the archbishop's court, and in cases of heresy, the foundation of the breach that afterwards followed with the see of Rome was laid, by an act for restraining the payment of first-fruits to that court, upon the accession to any bishopric. This act is chap. 20. of the same statute. It was thereby provided, that if any bishop presented to the pope was delayed on the above or any other account from his bishopric, he should be consecrated by the archbishop, and if an archbishop, by two bishops, and then installed, in the same manner and to the same effect as if the pope had concurred. That the court of Rome might have no just cause of complaint, in respect of making out bulls for such bishops and archbishops, they were allowed to pay for them 5*l.* in the hundred of the clear profits of their sees.

The king did not intend that things should be hurried to extremities at once; and this bill was only designed as a temperate measure to bring the pope to terms. It did not therefore receive the royal assent; but was to be held forth as a provisional regulation, till the king had compounded this claim of first-fruits with his holiness, or prevailed upon him entirely to renounce it. In the mean time, the whole conduct and direction of this transaction was to be left to the king, who was empowered to declare, within a certain period, whether this bill should be in force or not. Some

(a) Burn. Ref. vol. I. 80.

months after, on the 9th of July, 1533, the act was finally ratified by letters patent.

The breach with the see of Rome was much forwarded by stat. 24 Hen. VIII. c. 12. against appeals. It declares, in maintenance of the ancient law of the land, and the statutes (a) often made to support it, that all causes testamentary, causes of matrimony, divorces, rights of tithes, oblations, and obventions, shall be heard and finally determined within the king's jurisdiction and authority, and not elsewhere; notwithstanding any inhibitions, appeals, or other process, from the see of Rome, or elsewhere; and it is declared, that all sacraments and religious ceremonies shall be performed, notwithstanding any excommunication or interdict that might be issued (b). The penalty of a *premunire* was denounced on those who sued at Rome in defiance of the regulations of this act. The order of appeal was directed to be in the following manner: from the archdeacon or his official to the bishop; from the bishop or his commissary to the archbishop of the province; from the archdeacon of an archbishop to the court of arches or audience; and from thence to the archbishop himself: all these respective appeals were to be within fifteen days after judgment or sentence, and such as were before the archbishop, were to be determined without appeal. It was further added, that all causes of the above kind, in which the king had any interest, should, if any appeal was brought by the party grieved, be finally determined by the spiritual prelates and other abbots and priors of the upper house, assembled by the king's writ in convocation: a provision which had a view to the king's divorce then depending. There is added, a saving of all prerogatives heretofore enjoyed by the archbishop of Canterbury in all cases of appeal.

(a) Meaning the statutes of Edward I. and III. those of Rich. II. and Henry IV. against foreign jurisdiction. Vid. ant. vol. II. 157. 376. 379. and vol. III. 162. 164.

(b) Sect. 2.

At length, in the 25th year of this king (*a*), the pope's authority was totally destroyed by three statutes, ch. 19, 20, 21.; for ch. 14. of this statute, which repealed stat. 2 Hen. IV. c. 15. and confirmed stat. 5 Rich. II. stat. 2. c. 5. and 2 Hen. V. stat. 1. c. 7. concerning the punishing of heretics, had another object; except in one clause, which declares it shall not be heresy to speak against the see of Rome, as some ignorant people imagined it was. However, some restraint was by that act imposed on the arbitrary proceedings of the spiritual courts in cases of heresy; and, as it so far put an effectual limitation on the ecclesiastical power, this act must be considered as favourable to the Reformation (*b*).

The first of those three laws abovementioned is the *submission of the clergy*, then sitting in convocation; and it was now to be passed in parliament. The clergy thereby acknowledged, that all convocations had been, and ought to be, summoned by the king's writ; and they promised *in verbo sacerdotii*, that they would never make nor execute any new canons or constitutions without the royal assent to them. As many canons had been received which were found prejudicial to the king's prerogative, contrary to the laws, and heavy to the subject; it was ordained, that a committee should be appointed of thirty-two persons, sixteen of the two houses, and as many of the clergy, to be named by the king, who should make inquiry and have full power to abrogate and confirm such canons as they thought it expedient, with the king's assent. Appeals to Rome were once more condemned by parliament; and all appeals are directed to be made according to stat. 24 Hen. VIII. c. 12. just mentioned; only an appeal is by this act given from the archbishop's court, and from places exempt, to the king in chancery; upon which a commission is to be directed to such persons as the king shall name,

(*a*) An. 1534.

(*b*) Burn. Ref. vol. I. 142.

as in cases of appeals from the admirals court. This court of appeal has been since called the *Court of Delegates*.

Till the reformation of the ecclesiastical law was made, it was declared, that such canons, constitutions, ordinances, and synodals provincial, being already made, and not repugnant to the laws, statutes, and customs of the realm, nor to the hurt of the king's prerogative, should be used and executed as before (a): upon which saving, and the former usage of the kingdom, depends the present practice of the ecclesiastical courts; as the designed reformation of that law has never been effected. We shall, however, have occasion hereafter to make some observations on the steps taken for bringing about this reformation.

The second of these acts is chap. 20. which confirms the former statute concerning the non-payment of first-fruits: and further enacts, that bishops shall no longer be presented to the see of Rome, nor shall sue out any more bulls there; but that all bishops should be presented to the archbishop, and an archbishop to the other archbishop, or to any four bishops whom the king should name. When any see is vacant, the king is to grant a licence, or *congé d'élire*, to the dean and chapter to proceed to a new election, and therewith to send a letter missive containing the name of the person whom they are to elect; and if they delay the election for twelve days, the king is to nominate by letters patent. The person elected or nominated is to swear fealty to the king, and a commission is to issue for consecrating and investing him; after this he is to do homage to the king, and to be put in possession of the spiritualities and temporalities. The dean and chapter, or the bishop or archbishop, neglecting for twenty days to perform their parts, as prescribed by this act, are subjected to the penalty of a *præmunire*.

Next follows the famous act for discharging the subject from all dependence on the papal see (b).
Papal authority abolished.

(a) Sect. 7.

(b) Chap. 21.

The preamble complains of the intolerable exactions for Peter-pence, pensions, impositions, and bulls, which were contrary to the laws of the kingdom, and grounded on the usurpations and abuses of the pope in granting dispensations; whereas it stood, says the act, with natural equity and reason, that the king and parliament only should have power to dispense with laws, or to authorise some elect person to exercise that supreme authority. And forasmuch as the Convocation had recognized the king as supreme head of the church of England, therefore it was enacted, that all payments made to the apostolic chamber, and all papal provisions, bulls, and dispensations, should from thenceforth cease; and, for the future, all dispensations or licences for things not contrary to God's law, but only to the law of the land, should be granted within the realm; that is, by the archbishop of Canterbury, who is to grant them, in such cases as had been formerly used: and further, all dispensations which used to be taxed at Rome at or above 4*l.* were to be confirmed under the great seal. When the archbishop refused to grant such dispensations, the party might have a writ out of chancery for him to shew cause for his refusal; upon which his reasons were to be examined, and justice done in the case (a). There is a clause in this act which declares, that it was not intended to decline from the catholic faith of Christendom (b). The exemptions of monasteries was confirmed; and they were declared not to be subject to any visitation from the archbishop; but they were brought under the king's jurisdiction, who might grant a commission to visit them. Power was given to the king and council to reform all indulgences and privileges which had been granted by the see of Rome. The offenders against this act were subjected to a *præmunire*.

This law, by cutting off the trade of indulgences about divine laws, which had been so gainful to the church, gave

(a) Sect. 17.

(b) Ibid. 19.

great ease to the people. Not only the pope's power was hereby rooted out, but the religious houses now saw themselves within the king's power. This was aggrandized still more by the authority this act gave him of abrogating all its provisions by his letters patent, if he so pleased.

But the king's supremacy was not directly established by parliament till the following year, when it was enacted by stat. 26 Hen. VIII. c. 1. that the king shall be taken as "the only supreme head in earth of the church of England, " called *Anglicana Ecclesia* ; and shall have all authority " thereto annexed, to reform and correct all errors, heresies, and abuses, which may be amended by any spiritual " jurisdiction whatsoever."

When the king had been invested with this entire sovereignty over the church, it seemed like bringing things only into their old course, to give to him the first-fruits and tenths, which had been so lately taken from the pope : this was done by stat. 26 Hen. VIII. c. 3. It was in order to promote the good government of the church, that the primitive institution of suffragan bishops was provided for by stat. 26 Hen. VIII. c. 14. Every bishop was to present two persons to the king, who was to nominate one to be suffragan. The towns to which suffragans were to be appointed, with their duty and privileges, are mentioned in the act(a).

Henry may now be considered as having completed the whole of his plan against the bishop of Rome ; the remaining statutes on this subject being rather in aid of those already passed, than introductory of any thing entirely new. By stat. 27 Hen. VIII. c. 15. the commission of thirty-two persons to revise the canon law, was intended to be maintained. Ch. 28. of the same sessions, for dissolving the lesser monasteries, may be considered as a continuation of the scheme for humbling the clergy, and seems to have

(a) Vid. Barn. Ref. vol. I. 151.

been foreboded by the late acts ; that against dispensations, and that to establish the king's supremacy. The monasteries dissolved by this act, were those of only 200*l.* per ann. and under.

An amendment was made by stat. 28 Hen. VIII. c. 13. in the late law of non-residence. Many persons had availed themselves of the privilege allowed to students in the universities ; and, under that character, lived there in idleness, instead of residing at their livings. This act declares, that persons above forty years old shall not be intitled to the privilege of that exemption ; unless they are some of the heads and governing part of the university or colleges, or readers in divinity. Those under forty years must be such as attend at the ordinary lectures, disputations, and exercises, of the place ; unless they are readers in some of the liberal sciences. The last stroke at the papal power seems to have been made by stat. 28 Hen. VIII. c. 16. which declares all bulls, briefs, faculties, and dispensations, of what kind soever, heretofore granted from the see of Rome, to be void, and of no effect. As this act was only levelled at the many jurisdictions, privileges, and exemptions, that were claimed in different parts of the kingdom under the sanction of papal grants, it was necessary, in order to avoid much confusion, to add provisos to this sweeping clause : there is accordingly a saving of all marriages, appointments of bishops, ordinations, and the like ; and further, of all such cases as might legally be dispensed with by the archbishop of Canterbury ; which, however, were to be confirmed under the great seal : so that all these matters, instead of papal authority, would henceforth subsist only by virtue of this statute.

The remaining statutes relating to the Reformation are the following, which may be passed over in a short way, without any great loss to the historical lawyer. By stat. 31 Hen. VIII. c. 9. the king was empowered to create bishops by letters patent ; by chap. 13. of the same session, all the

remaining monasteries were dissolved ; and by chap. 14. was passed the law of the six articles, which, being an ordinance of a very penal nature, will more properly be considered hereafter, as well as some other statutes relating to heretics and offenders on the score of religion. By stat. 32 Hen. VIII. c. 26. the king was empowered to appoint a commission of bishops and some clergy to agree on a form of religion, for the observance of the whole nation ; and by stat. 34 and 35 Hen. VIII. c. 1. some provisions were made about *Tindal's* books ; which also being of a penal nature, will come under that division of the statutes of this reign.

Thus have we traced the progress of those measures by which this great revolution in our ecclesiastical polity was effected. The many struggles between the spiritual and temporal jurisdiction, in former periods, had ended most commonly to the advantage of the clergy ; but, in this reign, a new light was let in upon the nation, and the people, under the auspices of this spirited prince, were at length delivered from the yoke of blind and implicit obedience. The church was declared an entire and perfect body within itself, with authority to decree and regulate all things without dependance on any foreign power ; and the supremacy thereof was annexed to, and united with, the imperial crown of the realm ; so that a way was opened for all that followed in the next reign, to complete the reformation of religion. In the mean time, the ecclesiastical courts continued to possess all the detail of jurisdiction which they exercised in former times, except that they now had before their eyes the injunction of the late statute, to abstain from such doctrines as were repugnant to the law, statutes, and customs of the realm, and the king's prerogative.

Before we take leave of ecclesiastical matters, it will be proper to notice what alterations were made by parliament respecting some articles which were of a spiritual

concern: these are, marriage, the collecting of first-fruits and tenths, and the payment of tythes.

It had been the ancient custom of the chancery, that the six clerks, cursitors, and all others, except the clerk of the crown, should be unmarried, being originally all real clerks; and upon their marriage, they forfeited their places. This custom had gone out of use as to all, except the six clerks, who were still bound to the old rule. There was therefore an act made on purpose, namely, stat. 14 and 15 Hen.-VIII. c. 8. to enable them to marry, without prejudice of forfeiture. The clergy, who had the entire government of the ecclesiastical courts till this reign, had preserved the rule there inviolate, and they allowed no person who was lay or married to exercise any ecclesiastical jurisdiction: but now when all spiritual jurisdiction was declared to flow from the crown, as supreme head, and it was rather wished that the administration of justice there should not be in the hands of persons entirely devoted to the church, it was enacted, by stat. 37 Hen. VIII. c. 17. that all persons, as well lay as married, being doctors of the civil law, might be chancellor, vicar-general, commissary, official, scribe, or register, and exercise all jurisdiction ecclesiastical, as any others, being spiritual persons, might do.

The other statutes concerning marriage regard pre-contracts, and the degrees within which persons might marry. When Henry had married Anna Boleyn, and the act of succession, stat. 25 Hen. VIII. c. 22. was passed to settle the crown upon the descendants of this new union, it was thought prudent by every possible means to stigmatize the marriage with Catharine as unlawful. Accordingly a clause was inserted (a), which declared all marriages within the degrees there mentioned (all which were both Levitical and canonial, and that with a brother's wife is one) to be unlawful, and that persons so related might be separated

(a) Sect. 3, 4.

by the sentence of the ordinary. When this act was repealed by the second act of succession, stat. 28 Hen. VIII. c. 7. and the crown settled in another manner, this same prohibition was re-enacted; as the law of God, which no human power could dispense with. It was moreover declared, that the meaning of these prohibitions was, that if it chanced for any man to *know carnally* any woman, then all persons related to such woman within the above degrees, should be adjudged within the prohibitions (a), which was a refinement of the canon law upon this subject, and has been mentioned in a former place (b).

The legislature had in this case given parliamentary sanction to the doctrines of the canon law, respecting some of the prohibitions to marriage from consanguinity or affinity; but in stat. 32 Hen. VIII. c. 38. they took another course, and made a solemn declaration against the whole of the pontifical law upon this head, and also upon that of pre-contracts. The preamble of that act complains, that upon pretence of former contracts not consummate by carnal copulation, marriages consummated were dissolved and children bastardised: further, that marriage was prohibited by other impediments which had been invented only to be dispensed with; as kindred or affinity between cousins-german, and so to the fourth and fifth degree (c); carnal knowledge of any of the same kin

(a) Sect. 11, 12. The degrees of marriage prohibited by this act are these: "The son to marry his mother or stepmother carnally known by his father; the brother his sister; the father his son's daughter or his daughter's daughter; the son to marry the daughter of his father procreated and born of his stepmother; the son to marry his aunt, being his father's or mother's sister; to marry his uncle's wife, carnally known by his uncle; the father to marry his son's wife, carnally known by his son; the brother to marry his brother's wife, carnally known by his brother; any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister."

(b) Vid. ant. 58.

(c) There seems to have been a variety in the canon law upon this point. By a constitution of archbishop Lanfranc, none was to marry his own kin,

or affinity before in such outward degrees: all which the act pronounces to be contrary to God's law, and tending to great scandal, as persons were continually hunting after some pre-contract, kindred and alliance, or carnal knowledge, to make void a marriage that they were tired of. To correct this, it was now declared, by stat. 32 Hen. VIII. c. 38. that all marriages contracted between lawful persons, that is, persons not prohibited by God's law to marry, being solemnized in the face of the church, and consummate with bodily knowledge, or fruit of children, shall be judged good and indissoluble, notwithstanding any pre-contract not consummate with bodily knowledge. It was moreover declared, that no prohibition, God's law excepted, should impeach any marriage without the Levitical degrees. Considering what had passed before, the provision in this act against pre-contracts is very remarkable, and at that time gave occasion to much censure upon the proceedings against Anna Boleyn; for that which was now so much condemned, was then made the pretence for dissolving the marriage with her. Some endeavoured to reconcile this inconsistency by a wish in the king, indirectly to take away the impediment to the succession of her daughter Elizabeth. The other branch of the statute was to make way for the king's marriage with Catharine Howard, who was cousin-german to Anna Boleyn; this being one of the prohibited degrees by the canon law, but not by the Levitical degrees. The preamble states, as a reason for the act, that "what sparks

or that of a deceased wife, or the widow of a deceased kinsman, within the seventh degree. He rests this on a decree of Gregory the Great; but that pope, in his prescript to St. Augusta, allowed marriage in any degree beyond the fourth. A decree of that pope, to the effect Lanfranc intimates, is to be found in the Decretum; but is by later canonists pronounced to be an error of Gratian (a). There is a canon which allows those in the fifth degree to marry, and forbids those in the fourth to be separated, if married: this canon is attributed to Theodore of Canterbury (b).

(a) Caus. 35. Quæst. II. and III. c. 16.; and Johnson's Canons.

(b) Ibid. c. 20.; also vid. ant. 58.

“remained of the papal legislation might kindle hereafter
 “a great flame; and, at least, while they remained,
 “might shew that the pope’s power was not entirely
 “extinct.”

When first-fruits and tenths of spiritual preferments were given to the crown, by stat. 26 Hen. VIII. c. 3. several regulations were made for the due payment and ordering of this new revenue. These were succeeded by many other provisions, as ch. 17. of the same statute, stat. 27 Hen. VIII. c. 8. 28 Hen. VIII. c. 11. 32 Hen. VIII. c. 22. and 34, 35 Hen. VIII. c. 17. all which go into a particular detail of arrangement, much of which has been superseded by later statutes, and on that account, as well as the minuteness of the subject, is little worthy of attention.

Tythes. It was endeavoured to render the payment of tythes more regular, by assisting the ecclesiastical process. By stat. 27 Hen. VIII. c. 20. if any one disobeyed the process of the spiritual court, and the ordinary made application to one of the king’s council, or to two justices of the peace, they have power to commit the party, till he find security to obey the sentence of the court. It was again enacted, by stat. 32 Hen. VIII. c. 7. that all persons shall duly set out their tythes and offerings; and if they omit, they may be convened in the spiritual court, and ordered to pay costs; and two justices may, as in the former case, commit the party to gaol, till he give security to perform the definitive sentence. As tythes, and other spiritual dues, since the dissolution of monasteries, had come more into lay hands than before, it was thought proper to give the like common-law remedies as were in use for lay fees. It was therefore ordained, that any parsonage, vicarage, portion, pension, tythes, oblations, or other ecclesiastical or spiritual profits in lay hands, might become a subject of controversy, in a *præcipe quodd reddat*, *assise of novel disseisin*, *mortauncestor*, *quodd id deforceat*, writ of dower, and other writs original, as the case might

require ; and that fines and other common-law assurances might be made of them. But it was provided, that suits for subtraction of tythes or offerings should still be in the ecclesiastical court, as before (a). By stat. 37 Hen. VIII. c. 12. a number of regulations were devised respecting the payment of tythes in London. It seems a decree had been made by the archbishop of Canterbury, the chancellor Audley, and others of the council, to settle a course for the due payment of tythes in the city: upon this there issued letters-patent, and a proclamation directed to the citizens to enforce the execution of it; and by stat. 27 Hen. VIII. c. 21. all tythes and dues were directed to be paid in pursuance of this decree, until further order should be made therein by the king and the thirty-two persons who were to be employed in reforming the ecclesiastical law. After this, several disputes arose on the construction of this decree; and the parsons and citizens had agreed to submit their differences to the archbishop, the chancellor Wrythesley, and several others of the council: these parsons made another decree, which is inserted in the present act, and is thereby required to be observed.

Such was the history of this famous revolution. Precedence.
 in our ecclesiastical polity. Having disposed of this, we are at liberty to proceed to the provisions which were made for the better ordering of the civil state. Of these, the first regard is due to a regulation for marshalling the higher ranks of society according to their respective dignities. We have hitherto met with no example in our statute-book of any direction upon this head. The first is by stat. 31 Hen. VIII. c. 10. "For placing of the lords." It was a part of the king's prerogative to give such honour, reputation, and place to his counsellors, and others, his subjects, as seemed best to his wisdom; and such prerogative is asserted in these very words in the preamble of this statute; but

(a) Sect. 7.

the king was content that order should now be taken in his high court of parliament for ascertaining the degrees of precedence. It was therefore enacted, that no person, except the king's children, should sit at any side of the cloth of state in the parliament chamber, whether the king was present or not. And because, says the act, the king is supreme head in earth of the church of England; and for the good exercise of the said most royal dignity and office, he had appointed Thomas Lord Cromwell his vicegerent; he and all persons having that office should be placed on the right side of the parliament chamber, on the same form with the archbishop of Canterbury, and before him, and should always have voice to assent or dissent, as the lords of parliament (a). Next to him was the archbishop of Canterbury, then York, then London, Durham, Winchester, and then the other bishops; all on the same side, according to their ancienties, as had been accustomed. It seems that no order had before been made for assigning any place to the following officers in respect of their office; but they were now placed in this way: The lord chancellor, lord treasurer, lord president of the king's council, and lord privy-seal, being of the degree of barons or above, were to sit on the left side of the parliament chamber, on the higher part of the form, above all dukes, except such as were the king's son, brother, uncle, nephew, or brother's or sister's sons: the great chamberlain, the constable, the marshal, the lord admiral. The great master, or lord steward, and the king's chamberlain, were to sit in this order: after the lord privy-seal, above all persons of the same state or degree; the king's chief secretary, being a baron, was to sit above all barons; and if a bishop, before all bishops, not having any of the be-

(a) The appointment of Cromwell was entirely upon principles of canonical regulation. We have seen what was the office of *vicar-general*; and that he might be appointed by bishops or popes. Considering the king's present title of Head of the English church, his vicar-general could not but be placed before the archbishop of Canterbury. Vid. ant. 5.

forementioned offices. All dukes, not beforementioned, marquisses, earls, viscounts, and barons, not having such offices, were to be placed according to their ancienty, as had been accustomed. If the lord chancellor, lord treasurer, lord president of the king's council, lord privy seal, or chief secretary, were under the degree of a baron, they were to be placed at the uppermost part of the sacks, in the midst of the parliament chamber, either there to sit on one form, or upon the uppermost sack, in the order beforementioned.

This order of precedence was to take place not only in the parliament chamber, but also in the trials of peers; and in the star-chamber, and other assemblies of council, the chancellor, treasurer, president, privy-seal, the great chamberlain, the constable, marshal, lord admiral, grand master, or lord steward, the king's chamberlain and chief secretary were to observe the rank hereby given.

We proceed now from the highest to the lowest; from the different degrees of honour, to the various descriptions of poverty and wretchedness. We have seen what regulations had been made in former reigns for the suppression of beggars and vagabonds^(a). The increase of these evils is evidenced by various statutes made in this reign for the correction of them. It has been a favourite opinion, that the provision for the poor had never become an object of necessity, till the abolition of religious houses had deprived many persons of a support from the donations there regularly made; but the first statute we shall mention was passed before that event, and is nothing more than a continuance of the policy which had been begun many years before. It was enacted, by stat. 22 Hen. VIII. ^{The poor laws.} c. 12. that justices of the peace, mayors, sheriffs, bailiffs, and other officers of counties, cities, and towns, should divide themselves, and make diligent search within their divisions, for all aged, poor, and impotent

(a) Vid. ant. vol. III. 171.

persons, who were of necessity compelled to live by alms ; and such persons they were to authorize to beg within a certain hundred, city, town, parish, or other limit, as it should seem best to them in their discretion. The names of such persons were to be put in a roll, a copy to be certified to the justices in sessions, and a letter was to be delivered to such beggars, under seal, signifying they had authority to beg. Any person begging without such licence, and beyond his limit, was to be whipped, or set in the stocks three days and three nights, during which he was to be kept on bread and water. This was to be by order of a justice or high constable, who was after that to limit him a place where he might beg, and give him a licence.

Thus far of impotent persons. It was further provided, that if any person *being whole and mighty in body*, and able to labour, was taken begging, or vagrant, and could give no reckoning how he lawfully got his living, he might be brought before a justice of peace, high constable, mayor, or other officer of the place, who might direct him to be whipped out of the place at the end of a cart, till his body was bloody : and he was to take an oath to return to the place where he was born, or where he last dwelt before the punishment for the space of three years, and there labour as a true man ought to do. He was to have a letter testifying the time and place of his punishment, whither he was going, and what time was limited for such journey, within which time he was permitted to beg by the way. As often as he violated the terms of this letter he was to be whipped, till he arrived at the appointed place and betook himself to labour. If the person so whipped was idle, and no common beggar, he was to give security, should the officer think proper, for repairing to his place of birth or residence as beforementioned.

To secure the execution of this regulation, justices of the peace were, in their session, to enquire of the defaults

of towns in suffering begging, and impose fines on the inhabitants.

But no provision was made for the treatment of vagrants when they arrived at the place of settlement, nor for charging the inhabitants with the maintenance of the poor and impotent, or setting to work the valiant vagabonds. To remedy this, it was ordained by stat. 27 Hen. VIII. c. 25. that the public officers of such places should take order for the reception and support of such as were unable to labour, and for the putting to work such as were, under penalty of forty shillings for every month they should neglect. For this purpose they were to gather alms with boxes every Sunday, holiday, and other festival, or otherwise among themselves. All persons passed away in the above manner were allowed at every ten miles to call on the constable of the place to provide them meat, drink, and lodging, for one night.

Such public officers were to take up all children in every parish within their limits under fourteen and above five years of age, that were found begging and in idleness, and appoint them to masters of husbandry, or other crafts or labours, to be taught, and so be enabled to get their living; and they were to give them some of the charitable contributions to equip them for such service. Such as refused to go to service, or who departed from it without reasonable cause, being above twelve and under sixteen years, were to be publicly whipped.

Once in every month the above public officers were to cause privy search to be made, by night or by day, as they thought proper, for vagabonds and suspected persons, and all persons were to assist in such search. Those found a second time in a state of vagrancy were not only to be whipped, but to have the upper part of the gristle of the right ear clean cut off; which was to be performed by the constable, with the assistance of a substantial inhabitant of the parish. For a third offence he was to be committed

to prison by a justice, and then indicted for wandering and loitering ; and if found guilty, he was to suffer death as a felon and enemy of the commonwealth.

All common doles were forbid, and no person was to give alms in that or any other way, but only to the common boxes and gatherings before directed to be made. Bodies corporate, who by their institution were to distribute alms out of their revenue, were now required to give it, at the usual times, in money to such common boxes and gatherings. The churchwardens in every parish, calling to them six or four of their honest neighbours, had authority once a quarter to call such collector before them to give an account of money collected, and in what manner it was employed : and if any was embezzled or misapplied, he was to be committed to prison by a justice, mayor, or other officer of the place, till he restored the said sum. An account of all such receipts and disbursements was to be kept yearly by the minister or some other honest man of the parish ; the book to be in the custody of the constables and churchwardens, two or three of them, or some other indifferent man, and not the minister. There was a penalty of twenty shillings upon parishes that neglected to promote public collections. The act contains several other clauses, some of which were designed for turning the course of private charities, whether of monasteries or well-disposed persons, to these public boxes and gatherings ; some were to save mendicant friars from incurring the penalties inflicted on beggars, and religious persons from any restraint on giving to poor almsmen established in their houses, or to casual travellers, or to shipwrecked mariners, or other distressed objects ; in short, that they might give alms in such manner as would not encourage common begging and vagrancy.

Such were the regulations made in the reign of this king for the disposal of beggars and vagrants. These seemed particularly to deserve our attention, because they contain

the outline of the more enlarged system for the government of the poor, which was so much improved in the next reigns, and finally settled in that of Elizabeth. The laws made in this reign relating to the other branches of the inferior orders of society, the labouring part, such as *journey-men*, *apprentices*, and *artificers*, need not engage so much of our time; because most of them were not of a general import, but were calculated for particular trades and employments under particular circumstances. The wages of servants in husbandry, artificers, and labourers, were prescribed by stat. 6 Hen. VIII. c. 3. a penalty was imposed on those who took more; the hours of work and of meals were also settled. No master was to compel his apprentice to engage by oath or bond not to open a shop. The exaction of high fees for the admission of apprentices to their freedom was guarded against^(a). These with various other provisions of a more partial nature were made by parliament.

Numberless are the provisions made in this king's reign for the protection and advancement ^{Of trade.} of domestic trade and manufactures. Instead of encouraging foreigners, as heretofore, it was now endeavoured to collect all mercantile employment into the hands of natural-born subjects. Upon this principle various obstructions were placed in the way of foreigners who carried on any trade; and regulations were devised for better qualifying the rising generation. By stat. 14 and 15 Hen. VIII. c. 2. no stranger born out of the king's obedience, whether denizen or not, and using any handicraft, was to have any apprentice, nor more than two journeymen, unless natural-born subjects. Strangers and their wares were to be subject to the inspection of the wardens and fellowships of handicrafts in the city. Upon a petition of the tradesmen of London complaining of foreign artificers, a decree was made in the star-chamber in 20 Hen. VIII. and was confirmed by stat. 21 Hen. VIII.

(a) Stat. 23 Hen. VIII. c. 5.

c. 16. By this, among other things, it was directed, that no stranger artificer should have more than two stranger servants; but being a householder, he might have as many English servants and apprentices as he pleased. Those not being householders, nor keeping a shop at the time of the act, were forbid to keep any house, shop, or chamber, to exercise their craft or mystery; which was only a revival of a regulation made in the reign of Rich. III. (a). This provision was again renewed by stat. 32 Hen. VIII. c. 16. which likewise makes void all leases of a dwelling-house or shop to any stranger artificer not being a denizen; nor was such a person thenceforward to take any lease on pain of forfeiture; and both lessor and lessee was to pay 100 shillings. It is remarkable among those jealous provisions against strangers, it was over and over ordained, that such persons, not being denizens, should be bound by all the laws and statutes of the realm. Among the laws respecting trade may be reckoned several statutes for regulating the dress of all ranks of persons: these were frequently repealed and new ones made, as experience successively demonstrated the difficulty of subjecting such matters to parliamentary restrictions (b). Many other statutes were made for the conducting of different manufactures, of which, as well as of the other acts of this and the following reigns, it may be observed in general, that they had a tendency to give preferences to corporations and fraternities, and to encourage a spirit of monopoly.

The policy set on foot in the last reign, of turning the attention of farmers from pasturage to agriculture, was promoted by several statutes in this reign. If any one suffered a house of husbandry to go to decay, or converted tillage into pasture, the immediate lord of the fee was intitled to seize a moiety of the offender's land till the offence was reformed (c),

(a) Stat. 1 Rich. III. c. 9.
e. 6. 24 Hen. VIII. c. 13.
Hen. VIII. c. 13.

(b) Stat. 6 Hen. VIII. c. 1. 7 Hen. VIII.
(c) Stat. 7 Hen. VIII. c. 1. and vide stat. 25

Before we enter upon the laws relating to private property, we shall briefly speak of one or two provisions that principally respected tenures. The abuses, probably, introduced under the late administration of Empson and Dudley, made it necessary to add to the ^{Escheators.} number of those acts that had already been passed for the taking of inquisitions by escheators and commissioners (a). The complaint now was, that sometimes untrue offices were found, sometimes offices were changed, and sometimes such were returned as had never been found. To remedy this it was enacted, in the first year of this reign (b), that no escheator or commissioner should return an inquisition or office concerning lands or hereditaments, unless found or presented by twelve men under their seals and indented, under penalty of 100*l*. All escheators and commissioners were to have lands of forty marks per ann. Inquisitions were to be taken in an open place, according to the statutes, and every one was to be at liberty to give evidence openly before the inquest. The jurors were to have a qualification of estate of forty shillings annually. A counterpart of the inquisition sealed and indented was to remain with the foreman. The inquisition, when found, must be received by the escheator; the clerk of the petty bag, or officer of the exchequer, if returnable there, was required to receive the return from him; and the clerk of the petty bag was to certify a transcript of all inquisitions into the exchequer. No one was to be escheator for more than a year. All these qualifications were enforced with penalties.

The time of traversing an inquisition, which was confined by a former statute (c) to a month after the return, was enlarged to three months, and all grants made previous to that time were to be void (d). By an act of the same session, all inquisitions found in the last reign by procurement of

(a) Vid. ant. vol. II. 373. and vol. III. 273.

(b) Stat. 1 Hen. VIII. c. 2.

(c) Stat. 8 Hen. VI. c. 10.

(d) Stat. 1 Hen. VIII. c. 10.

Empson and Dudley, intitling the king to tenures *in capite*, were allowed to be traversed, notwithstanding the parties might have sued livery; and it was declared such livery should not conclude them (a).

The law of private rights was affected by several statutes during this reign, many of which were not less important than those we have been relating. The statutes upon this head either regard the properties and incidents of estates, or the modes by which they may be conveyed. Of these the former claim our first attention. We shall begin with some statutes which ever since have had very extensive influence upon leases of lands.

Terms for It was in consequence of the new practice of
years. suffering recoveries, that it was now thought necessary to enlarge a provision made in the reign of Edward I. (b) to protect termors. As that act speaks of a lessee having an action of covenant, it was concluded that no lessees but those by deed could be protected by it. The new statute includes both leases by indenture, and those without writing. As a lease for years was an interest issuing out of, and dependent on, the inheritance and freehold of the lessor, it derived all its strength from the goodness of that title, and by it must stand or fall. Thus a term lay at the mercy of the freeholder, who now had a method by which he could destroy his own estate, namely, by a fictitious recovery, and so destroy the interest of his lessee. This device was often practised to get rid of tenants who had excited envy by the great improvements they had made, or had any way disoblged their landlord. To prevent an injustice of this kind, and at once give stability to these contracts, and insure to the cultivator of the soil the reward of his toil and expence, was an object worthy the attention of parliament. It was accordingly ordained, by stat. 21 Hen. VIII. c. 15. that all lessees for years should be enabled to

(a) Stat. 1 Hen. VIII. c. 12.

(b) Vid. ant. vol. II. 150.

falsify these recoveries, and maintain their leases against the recoverors, as against their lessors. It was further provided, that no statute merchant, statute staple, nor execution by *elegit*, should be made void by any feigned recovery.

After this, a term for years became a permanent and certain interest; the value of which might be estimated by the period of time for which it was created, without calculating the contingency of an untimely dissolution, to which it was before subject. Long terms, as they could now be purchased with safety, became more common. They were soon after this converted to the purpose of raising portions for children by mortgage, or otherwise; in family-settlements; and by the aid of the statute of uses, became the object of much of that artificial stile of conveyancing which began about this time to gain ground.

When the interest of lessees was protected Leases of tenant in tail. against the feigned recovery of the freeholder, it was thought equally expedient to give them some security against the issue of a tenant in tail, who claiming by a title paramount the ancestor, could avoid any leases made by him for longer term than his life. A like inconvenience was felt in other instances of leases made by persons who had only a life-estate. To remedy all this, the following provision was made by stat. 32 Hen. VIII. c. 28.: All leases, says that statute, made by indenture for years, or for life, by any person seised in fee, or in tail, in his own right, or in the right of his church or wife, or jointly with his wife, shall be good and effectual in law, the same as if the lessor was seised in fee-simple, provided they are made under the following circumstances; if they are not made to any lessee having an old lease (unless the old lease be expired, or surrendered within a year next after the making of the new one); and if they are not made in reversion. It was also required, that the land should have been most commonly letten to farm, or occupied for the last twenty years; that the lease be not made without impeachment of waste, nor

be for above twenty-one years, or three lives; and that there be reserved yearly so much rent as had been most accustomably paid for the last twenty years. Moreover, where the inheritance belongs to the wife, she must be a party, and the rent reserved to the husband and wife and *her* heirs, according to the estate she has; and the husband is not in any case to alien such rent any longer than during the coverture, otherwise than by fine (a). No act of the husband during the coverture shall cause a discontinuance, or be any wise prejudicial to the wife, or her heirs. It was provided (b), that this act should not be construed as giving a power to any parson or vicar to make leases of his land, tythes, or other profits belonging to his church, otherwise than he could at common law.

This is the substance of what has since been called the *Enabling Statute*; because it empowered certain persons to make such leases as they could not before make: and it is so called in contradistinction to some acts passed in the reign of queen Elizabeth, which imposed certain restraints on church leases; and are thence called the *Restraining Statutes*.

The interest of lessors and lessees came under the contemplation of the legislature in another point of view. This was occasioned by the dissolution of religious houses; which gave rise to a provision calculated not only to remove an inconvenience which was particularly felt at that time, but such as would increase daily, while a disposition and power to alien land prevailed. Covenants in leases, like other covenants, could only operate between the parties and their privies; that is, those who were heirs or executors to the covenantors or the covenantees; so that grantees of reversions of lands held of religious houses, who were now a very considerable body among the landholders of the kingdom, could not avail themselves of the

(a) Sect. 6.

(b) Ibid. 4.

benefit of covenants in leases granted to their tenants; and tenants, on the other hand, were deprived of advantages stipulated by their former landlords. The first provision on this head was stat. 31 Hen. VIII. c. 13. which gave to the king all advantage, whether of covenants, conditions, or the like, as the lessor would have had. By stat. 32 Hen. VIII. c. 34. this was extended to the grantees of the king; and further, to make this equitable remedy universal, mutual redress is given, in all cases of landlord and tenant, where the former grants his reversion to another.

A defect of the old law respecting executors was supplied in the same sessions by stat. 32 Hen. VIII. c. 37. The executors of persons seised of rents could not, any more than their heirs, recover the arrearages which had accrued in the testator's lifetime. This act provides, that the executors and administrators of any person seised in fee-simple, in tail, or for life, of rents or fee-farms, may have an action of debt, or distrain for all arrears due at the death of his testator, or intestate; as may a husband, seised as aforesaid in right of his wife, after the death of his wife, for the like rents or fee-farms due and unpaid in her life; and a person seised during the life of another, after the death of *cestui que vie*, and so may his executors or administrators.

An alteration made respecting jointenancy and tenancy in common seems dictated by the necessities of a commercial people. The idea of property possessed by two or more persons, where each has in him the *entire whole*, and *every parcel* of that whole, as joint tenants are said to have, is a subtilty in jurisprudence which savours much of the age in which it was conceived. That every parcel of this undivided whole should survive to the longest liver, was, perhaps, no more than a consequence of the original refinement. But this consequence was found

very prejudicial to credit ; as property, that should satisfy demands on the estate of the deceased, was absorbed by a stranger, whose only merit was the fortune of having survived his joint owners. The unity of possession between tenants in common, likewise, though not subject to the doctrine of survivorship, had, however, its inconveniences, to which a clear and several estate was not liable. These estates we have seen were divisible only by the consent of the parties (a) ; and it was now thought desirable, that means should be provided for compelling those who might unreasonably withhold their consent. It was accordingly enacted, by stat. 31 Hen. VIII. c. 1. that joint tenants, and tenants in common, of any estate of inheritance, in their own right, or in right of their wives, may be compelled to make partition, by writ *de partitione faciendâ*, to be devised in the chancery, in like manner as coparcenors are compellable by the common law. As this act was confined to estates of inheritance, the provision of it is extended, by stat. 32 Hen. VIII. c. 32. to tenants for life and years ; and also where one person has an estate for life or years jointly, or in common with another who has an estate of inheritance or freehold.

A piece of old law relating to entry on land, and the tolling of entry by a discent (b), underwent an alteration which has prevented some of the injustice which used to follow from that notion. It was hard that a disseisor, because he died seised, should thereby intirely deprive the injured person from making his entry, and pursuing his legal remedy upon it ; but oblige him to resort to a more tedious proceeding. It was therefore enacted, by stat. 32 Hen. VIII. c. 33. that the dying seised of such disseisor shall not be deemed a discent in law, so as to toll the entry of the disseisee, or his heirs, unless the disseisor

(a) Vid. ant. vol. III. 349.

(b) Vid. ant. vol. III. 19.

had been in peaceable possession for five years after the disseisin.

Some changes were made in the law of estates, by the two following acts. By stat. 31 Hen. VIII. c. 3. it was ordained, that certain lands in Kent (*a*), which descended according to the custom of gavelkind, should thenceforward be descendible as common-law estates; the other was, an act which put some further restraint upon gifts to superstitious uses.

There were some gifts of land, which, not being within the statutes of mortmain, had ^{Gifts to superstitious uses.} very much increased. It was thought expedient to restrain these alienations, as equally prejudicial to the community with those in mortmain. This was done by stat. 28 Hen. VIII. c. 10. which makes void all dispositions of land to the use of parish-churches, chapels, churchwardens, guilds, fraternities, commonalties, companies, or brotherhoods, erected for devotion, or by common assent, without incorporation; and also dispositions to the intent to have *obits* perpetual, or service of a priest for ever, or for sixty or eighty years. As the age became enlightened, gifts of this kind were viewed with a less favourable eye. These sentiments concurring with the designs of the enterprising prince upon the throne, contributed towards the general attack which was soon after made on one branch of such institutions, the religious houses. These repositories, where so much wealth had been accumulating for ages, were broken open, in pursuance of stat. 27 Hen. VIII. c. and stat. 32 Hen. VIII. c. and, happily, their contents were once more permitted to mix in the national circulation.

Next to the laws respecting the nature and properties of estates, we proceed to those which related to the conveyance of them. Several regulations were made for the confirmation of fines and recoveries, as assurances of

(a) Vid. ant. vol. II. 310.

land ; and some of a very particular kind were made for the better ordering of uses and wills.

Of common recoveries. The application which had lately been made of common recoveries, rendered them a very interesting object of parliamentary notice. As they were become a common assurance of estates, they began to deserve every support which could be given them. It was common to suffer recoveries of land for the performance of wills, for surety of jointures, and other estates ; and as such recoveries were had by mere consent and agreement, as a conveyance of the title, it was held, that as the recoverers came in merely under the estate of the recoverees, they had no power by law to compel the attornment of the tenants, nor could they obtain their rents and services by distress or action ; and where an advowson was appendant, and an avoidance fell, they had no remedy for a disturbance. They are therefore enabled by stat. 7 Hen. VIII. c. 4. to distrain, and make avowries for rents, services, and customs, and bring a *quare impedit*, as those persons, against whom the recovery was had, might have done. This act was confined to distresses and avowries for rents, services, and customs. As a recoverer could not, upon this statute, have an action of debt against a lessee for years, nor *waste* against a tenant for life, or years, these defects are cured by stat. 21 Hen. VIII. c. 15. and such actions are given in the same manner to the recoverer as the lessor might have had them.

This provision as to avowries, was of use where the tenant was known ; but it often happened, that, by secret conveyances to uses, lords were at a loss on whom to make their avowries ; the ownership of the land often passing without any notice, or sign of alienation. It was for this reason enacted, by stat. 21 Hen. VIII. c. 19. that lords distraining *may* avow on the land, as in land within their fee, or seignior, without naming or making

avowry on any person in certain. As the statute uses the word *may*, lords have their election to avow according to the statute, or, as they before did, at common law (a).

To return to the provisions made respecting common recoveries. It was declared by stat. 32 Hen. VIII. c. 31. that a recovery of land had by assent of parties against a tenant by curtesy, tenant in tail after possibility of issue extinct, or tenant for life, should be void, with regard to those in reversion or remainder, unless it was by good title, or assent to those in reversion or remainder. In this manner, by obviating the abuse of it, did the parliament tacitly acknowledge and ratify the application of a recovery as an assurance of land. So intirely were recoveries considered as a common assurance and conveyance, that where they were suffered of lands held of the king, a fine was required by a clause in the statute of wills, stat. 32 Hen. VIII. c. 1. to be paid for the writ of entry in the chancery, the same as for alienation, by fine or feoffment.

Some doubts had arisen, whether the indirect and general wording of the statute of fines passed in the last reign, might not bear a construction which would make a fine to be taken as a bar to an estate tail. In the 19th year of the king, this question was solemnly argued at Serjeant's-inn; when it was held by three justices, that the issue were not barred; and by five, that they were (b). The former insisted that the issue were aided by the second saving clause; the issue being neither party nor privy, but as strangers claiming by the donor. The latter denied this; holding the issue clearly to be privy to the fine levied by their ancestor. However, if any doubt remained, an act was now made to remove it; and it was declared by stat. 32 Hen. VIII. c. 36. that a fine levied by a tenant in tail of full age, according to stat. 4 Hen. VII. should be a sufficient bar to himself and his heirs claiming by force of such entail.

(a) 1 Inst. 268. b.

(b) 19 Hen. VIII. 6.; and also Dyer, 2. 1.

There was in this act an exception in favour of the inheritance of a husband, protected by stat. 11 Hen. VII. c. 20 (a). and of lands where the reversion was in the king; so that a fine of such land, levied by tenant in tail, remains intirely on the construction of stat. 4 Hen. VII. The parliament took the same care of the king's interest in the case of recoveries, as in the case of fines; for it was declared by stat. 34 and 35 Hen. VIII. c. 20. that no reversion in the king should be barred by a recovery. This was not before the point had been agitated in court. In the 29th of the king, it had been held by the judges, that a recovery suffered by tenant in tail, though a bar to the issue, should be no discontinuance of the tail, and so no bar of the king's reversion; but *Shelley* doubted (b). Among the provisions for giving stability to these securities, we may reckon stat. 37 Hen. VIII. c. 19. As none of the statutes of fines extended to the county palatine of Lancaster, it was thereby ordained, that fines levied before the justices of assise there, proclaimed three several days the sessions they were ingrossed, and three several days the two next sessions, should have the same force as fines levied in the court of common-pleas.

The principal provisions upon the nature of conveyances were such as concerned uses and wills; two subjects which were very intimately connected in their circumstances, and now went hand in hand in the regulations the parliament thought proper to devise respecting them. We shall therefore, conformably with the idea that prevailed at the time, take a view of these statutes together, whether they relate to uses or wills, in the order in which they were made, as the most natural one for illustrating this important branch of our law of real property.

In the last reign some relaxation had been
Devise of land, given to the general law which restrained a de-

(a) Vid. ant. 140.

(b) 28 and 29 Hen. VIII. Dyer, 32. 1.

use of lands. We have seen what indulgence had been given to persons in the king's wars to make feoffments to the use of their wills, without licence. Again, in this reign, by stat. 3 Hen. VIII. c. 4. a permission was given to tenants *in capite* to alien without licence, and if they left a son within age, their executors, feoffees, or assigns, were to have the ward and marriage towards the performance of the will. By stat. 14 and 15 Hen. VIII. c. 14. those in the king's service, in the wars, might alien their lands for the performance of their wills, without a fine for alienation, with the same indulgence as to ward and marriage. These were partial regulations, calculated for the benefit of persons under very particular circumstances.

A disposition to favour devises of land discovered itself afterwards in a more general way, in stat. 21 Hen. VIII. c. 4. Land devisable by custom was very often left for executors to sell; and in such case, if one of them refused to join in the sale, the sale could not be legally perfected by the others (a). It was enacted by this act, that in such circumstances, where any of the executors refused to take upon them the burthen of the administration, a sale by those who did act, should be good and valid. Though the letter of this act extends only to executors who have a *power to sell*, yet, being a beneficial law, it has received a liberal construction, and has been considered as taking in cases where land is *devised* to executors to sell; that is, where they have not barely a power, but a power coupled with an interest.

Hitherto we see the power of devising land received some favour from the parliament; but this matter was taken up again in a very different way: the power of devising the use of lands, carried the general power of transferring property by will much further than was consistent with the nature of tenures. It tended to deprive lords of their

(a) Vid. ant. vol. III.

wards, marriages, and reliefs, and the king of his *primer seisin*s and livery, with other casualties, which constituted a great part of the old revenue of the crown. We have seen in the former reign, that the statutes which were made to protect the lord's claims upon a descent on the death of *cestui que use*, contained an exception of cases where a will was declared (a). This excited a great jealousy, both in the king and other great landholders. The king, in the 22d year of his reign, caused a bill to be drawn, which was to moderate the consequences of this innovation: it was intended by this bill, that every one should have free liberty to dispose of half of his lands, in the way of devise; and he told the parliament, if they would not take a reasonable thing, when offered, he would seek out the extremity of the law, and would not offer so much again. This act passed the lords, but was rejected by the commons. The king, disappointed by this failure, consulted the judges and eminent lawyers, and the question was solemnly argued in chancery, where, we are told, it was decided, that a man could not bequeath any part of his land in prejudice of his heir (b); a proposition, of which there could be little doubt, if it is to be understood of the devise of *land*, and which, notwithstanding, left the question, as to declarations of uses, where it was. The only remedy was to destroy uses entirely; and it was with that view that the statute of uses was procured some few years after.

Statute of
uses.

The mischiefs arising from uses were not confined to the single object of feudal claims on land, but infected almost every transaction concerning landed property. These mischiefs were not subdued by the remedies the legislature had already, at different times, applied. Indeed one of those remedies, the statute of Richard III. had somewhat increased the perplexity before complained of, that of divers claims to the same land. That statute had en-

(a) Vid. ant. 139.

(b) Burn. Ref. vol. I. 112.

abled the *cestui que' use* to make feoffments and other assurances of his land, while the feoffees still continued their common-law right over it. The consequence of this was, that the *cestui que use* might limit an estate for life, or in tail, or make a lease of the land; and the feoffee, perhaps, might do the same, having each an equal right.

Thus, purchasers were never safe while two persons had the disposal of the same land. But the numerous other inconveniences attending uses, as recited in the statute, made it necessary to apply some fundamental remedy to these disorders. This was meant to be effected by the famous statute of uses, 27 Hen. VIII. c. 10. What the opinion of that age was upon this subject, and what was the design and plan of that statute, cannot be better collected than from the title and preamble of it. It is intitled, "An Act concerning Uses and Wills." And the preamble states, that "Whereas, by the common laws of this realm, lands, tenements, and hereditaments, be not devisable by testament, nor ought to be transferred from one to another, but by solemm livery and seisin, matter of record, writing sufficient made *bonâ fide* without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices, have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometime made by *nude parole* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited by sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; at which times, they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly, and unadvisedly, their lands and inheritances; by reason whereof, and by

" occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly, at sundry times, disherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids *pur faire fits chevalier & pur file marier*, and scanty any persons can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions, for their rights, titles, and duties; also men married have lost their tenancies by the courtesy, women their dower; manifest perjuries by trial of such secret wills and uses have been committed; the king's highness hath lost the profits and advantages of lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted; and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common law of this realm: for the extirpating and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors," this act was made. Such is the preamble of the act usually called *the statute of uses*; and in all pleadings and deeds, the statute for *transferring uses into possession*, or the statute for *conveying the possession to the use*.

If one statute of Richard III. had added to the former mischiefs of uses, another furnished a hint for the entire destruction of them. That monarch, while duke of Gloucester, had been infeoffed to uses, either jointly with others, or by himself. To obviate the notion of law, that the king cannot be seised to a use, and the manifest injustice of his holding such lands discharged of the use; it was provided by that act, that where he was joint feoffee, the other feoffees should stand seised to the uses without him; and

where he was sole seised, the land should be vested in the *cestui que use*, in the same manner as he had the use. In a similar way, the statute of uses enacts, that, when any person shall be seised of lands, or other hereditaments, to the use, confidence, or trust of any other person or body-politic, the person or corporation intitled to the use in fee-simple, fee-tail, for life or years, or otherwise, shall from thenceforth stand and be seised, or possessed of the land, of and in the like estate as they have in the use, trust, or confidence; and that the estate of the person so seised to the use, shall be deemed to be in them that have the use, in such quality, manner, form, and condition, as they had before in the use. Thus the statute executes the use, as it is termed; that is, transfers the use into possession; by which means the *cestui que use* becomes completely possessed of the land in law, as he was before in equity.

No form of words could be imagined more simple, and, at the same time, more efficacious for the annihilation of uses, than the purview of this act. By a kind of legal magic, the whole frame of landed property seemed on a sudden to be changed; and every man, who before had only the use of his estate at the mercy (almost) of his feoffees, was made, in an instant, the complete and lawful owner of it. The parliament seem not to have foreseen that any use could survive the operation of this statute, or any new one be created, except only on a bargain and sale; and as soon as that was discerned, an act was made in the same sessions (a) to put some guard to these transactions, by requiring them, when they concerned any freehold interest, to be by deed indented and inrolled. They designed, most certainly, that lands should pass no longer by limitation of use, but by formal livery on the land, matter of record, or some other common-law conveyance, as mentioned in the preamble of the statute.

(a) Chap. 16.

had made good the threat he had held out a few years before, which intimated a design to take away the power of devising entirely. When this restraint was wrought up to its highest pitch, the inconveniences of it were felt too sensibly for it to endure long; and in a few years it was found necessary to allow, by express statute, the power of devising land, upon the footing that had been proposed by the king some years before.

Accordingly, an act was passed in the thirty-second year of the king(a), which, from the governing idea upon this subject, was intitled, *The act of wills, wards, and primer seisins*, whereby a man may devise two parts of his land. The preamble intimates the grace and goodness of the king towards his subjects, in granting them every thing which he in his benevolence could confer; and states, as a reason for making this act, that persons of landed estates could not conveniently maintain hospitality, nor provide for their families, the education of their children, or payment of their debts, out of their goods and moveables. It ordains therefore, that all persons having any manors, lands, tenements, or hereditaments, may give and dispose of them, as well by last will, or testament in writing, as by any act executed in their life-time, in the following manner: If they held in socage, or of the nature of socage, and held none of the king by knight-service, by socage in chief, nor of the nature of socage in chief, nor of any other person by knight-service; or if they held of the king in socage, or of the nature of socage in chief, or of any other person, and none of the king or any other by knight-service, they might devise the whole; with a saving to the king of his *primer seisin*, and reliefs, and fines for alienation, and all other rights and dues belonging to socage-tenure. If they held of the king in chief by knight-service, or of the nature of knight-service in chief, they might devise two

(a) Chap. 1.

parts, or as much as should amount to the yearly value of two parts in three, in certainty, and by special divisions, so as it might be known; saving to the king the custody, wardship, and *primer seisin*, of as much of the lands as amounted to the full yearly value of a third, without any diminution, dower, fraud, covin, or cheat, and also his fine for alienation. The same if they held of the king by knight-service in chief, and had also other land of the king, or of any other by knight-service, or otherwise, with the same saving of custody, wardship, *primer seisin*, and fines for alienation. If they held some lands by knight-service, and some in socage, or of the nature of socage, of any common person, then they might devise two parts of those held by knight-service, and all those held in socage, with the same saving. If they held only of the king by knight-service, and not in chief; or held by knight-service, and not in chief of the king; and also of another by knight-service; and also of another held other lands in socage, or of the nature of socage; then they might devise two parts of those held of the king, and two parts of those held of the others by knight-service, and the whole of those held in socage; saving to the king and the other lords, their respective rights and casualties, as beforementioned.

In all these cases, if the part coming to the king did not amount to a full third, he might take into his hands as much of the other two parts as would make up a clear yearly value of the full third belonging to the king in title of wardship and *primer seisin*, or the like; and the lord was to have a like advantage respecting his third part, for title of wardship: and all persons were to sue their liveries for possessions, reversions, and remainders, and pay reliefs and heriots as before.

It was declared, that if two or more persons held lands of the king by knight-service, jointly to them and the heirs of one of them; and he who had the inheritance

As to the fines for alienation, without licence, directed by the last act to be paid by those who took any freehold under such wills ; it was declared, that they should be remitted by suing forth the king's pardon, and paying the third of the yearly value of the lands so devised : and the chancellor was hereby empowered to issue such pardons without applying to the king.

It was declared, that a will of lands, tenements, or hereditaments made by a feme covert, any person under twenty-one years, idiot, or of non-sane memory, should not be good or effectual.

In the spirit of a provision, in the stat. Marl. (a) it was ordained, that if any person holding by knight-service of the king, or another, or in chief, by will, or other act in his life, gave his manors, lands, tenements, or hereditaments, by fraud, or covin, to any one for term of years, life or lives, with one remainder over in fee, or with divers remainders over for term of years, life, or in tail, with remainder over in fee-simple, to any person, or to his right heirs, or should make by fraud or covin, contrary to the intent of this act, any estates, conditions, menalties, tenures, or conveyances, to defraud the king of his prerogative, primer seisin, livery, relief, wardship, marriages, or rights, or any other lord of his wardships, reliefs, heriots, or other profits which should arise by the death of any tenant ; then, upon office being found, the king should have his right, as if no such estate had been made, until such office be legally done away by traverse, or otherwise. And any other lord might bring his writ of ward, distrain or avow, as the case might be ; saving, however, to the donees or devisees their interest after the king and lord were satisfied. Lastly, it was provided, that where the king or any lord took any lands to make up his full third ; the person from whom they were taken, should

(a) Vid. ant. vol. II. 62.

obtain a contribution against all persons intitled to the other two parts by bill exhibited in chancery.

This is the substance of the two famous statutes concerning wills of land. Except in the instance of land devisable by custom, devises before these statutes were in consequence of some feoffment to the use of a will, so that the devise made in pursuance thereof, gave only an equitable right to be established by the authority of the court of chancery, being, in fact, no more than a declaration of a use; but now, being authorised by statute, a will of land became a new mode of conveyance on the death of the testator, cognizable in the courts of common law. So much of uses and wills; the statutes concerning which are strongly allied to each other in their reason and consequences, and may be considered as a system of constitutions, forming a remarkable period in the history of landed property.

Thus far of real property. We shall next consider some few particular instances of parliamentary interposition, for altering the modes of securing property, and redressing injuries to personal estates, before we come to the general alterations which were made in the administration of justice. First, of the recognizance in nature of a statute staple; then of bankrupts, and usury.

This new security was framed by stat. 23 Hen. VIII. c. 6. and was denominatèd, after the original from whence it was framed, *A Recognizance in the nature of a Statute Staple*. The statute staple, as we have seen (a), was a charge on land, which was contrived as a security to be used by those only who had dealings in the staple; it was therefore, like the statute-merchant, confined to certain persons and places. It had, however, by a fiction lately introduced of surmising the debt to have been contracted in the staple, been extended beyond its primary design;

(a) Vid. ant. vol. II. 293.

and this has tempted many to court a situation and character, from which, in the reign of Henry VIII. they would have shrunk with horror: so that, if the severity of the first bankrupt-law was carried too far, the opportunity of imposing on the ease of modern ones by fraud and collusion, makes many doubt of their benefit to the community.

The prejudices against usury had worn off; and a rational commerce had taught the nation that an estate in money, as well as an estate in land, might be let out to hire, without the breach of one moral or religious duty. The parliament concurred with the opinion of the times, and by stat. 37 Hen. VIII. c. 9. all former acts (a) against usury, as an offence, were repealed; and a certain sum to be given for the loan of money was permitted, under the following terms and precautions: In the first place, it was by this statute enacted, that no person should sell his wares or merchandize, and within three months buy them again at a lower price; nor should any one by means of any corrupt bargain, loan, exchange, chevisance, shift, interest of any wares, merchandizes, or other thing; or by any other corrupt or deceitful way or means, or by any covin or conveyance, receive or take for the forbearing or giving day of payment for a year for his money or other thing due for the said wares or merchandizes, or other thing, above 10%. nor should sell, bargain, or mortgage any lands upon any higher interest: and those who transgressed in any of these points, were to forfeit treble the value of the thing bargained for, and suffer fine and imprisonment at the king's pleasure. The provisions of this act have undergone some qualifications by later statutes (b).

In speaking of the administration of justice, we shall first mention certain new courts, which were erected by

(a) 20 Hen. III. c. 5. 3 Hen. II c. 5, 6. 11 Hen. VII. c. 8.

(b) Stat. 2 and 3 Ed. VI. c. 20. 13 El. c. 8. 31 El. c. 5, &c.

parliament: some of these concerned criminal matters, and, therefore, will be more properly notized hereafter; others, which were of a civil nature, may very properly be placed here: they all related to the better collection and management of the king's revenue.

The dissolution of religious houses opened a new source of revenue to the crown; for the governance of which was erected by stat. 27 Hen. VIII. c. 27. *The Court of Augmentation of the Revenues of the Crown of England*. This was a court of record, with a seal; a person was to be appointed and called chancellor of the court of augmentations. There was beside to be a treasurer, attorney, solicitor, several auditors and receivers, with clerks, and other necessary retainers to a court. Another was established by stat. 33 Hen. VIII. c. 39. called *The Court of General Surveyors of the King's Lands*. This was to be a court of record, and to have a seal. Several persons were to be appointed and called the general surveyors of the king's lands; which several persons were to constitute only one officer. The treasurer of the king's chamber was always to be treasurer of the revenues of this court, and was to rank next to the surveyors; the next officer was to be the king's attorney of this court; the next was master of the woods: then followed the several auditors and receivers; clerks were to be appointed, with other necessary appendages to a court. All such lands, and no other, as were mentioned in a schedule, signed with the king's sign-manual, were to be within the order and governance of this court. Henry afterwards, in the 38th year of his reign, dissolved both these courts by letters patent; and by letters patent erected a new court of augmentation: both which acts of authority have been held contrary to law, and to require the confirmation of parliament to give them force, as was afterwards done by stat. 7 Ed. VI. c. 2. But the date of this re-establishment was short; for queen Mary, according to a power given her by stat. 1 Mar.

c. 10. did, by letters patent in that same year, dissolve this court; and the next day, by other letters, *united the same* to the exchequer: which last step was resolved afterwards (a) by all the judges to be utterly void, as there remained after the dissolution no court to be united (b). Such was the fortune of these two courts.

By stat. 32 Hen. VIII. c. 45. a court of *the first-fruits and tenths* was established. This was a court of record, with a seal; the principal officer of which was to be called chancellor of the first-fruits and tenths. There was to be a treasurer of the first-fruits and tenths; the third person in the court was to be the king's attorney of the first-fruits and tenths: there were to be auditors and clerks messengers, and other retainers. This was dissolved by stat. 1 Mar. sess. 2. c. 10. and the clergy exonerated from these payments by stat. 2 and 3 Ph. and Mar. c. 4.; and though the crown resumed the first-fruits and tenths by stat. 1 El. c. 4. yet the court was not revived.

For the survey and management of the valuable fruits of tenure, a court of record was erected by stat. 32 Hen. VIII. c. 46. called *The Court of the King's Wards*. To this was annexed, by stat. 33 Hen. VIII. c. 22. *The Court of Liveries*; so that it then became *The Court of Wards and Liveries*. This, like other parts of the king's revenue, was before under the government of the exchequer.

This judicial establishment had a longer continuance than the other novelties of this sort projected by Henry and his parliament; it continued as long as the object of its judicial cognisance had existence, exercising this jurisdiction with great vigour till the abolition of tenures. An establishment of such importance deserves, therefore, some more particular notice among the innovations in our juridical polity.

(a) Dyer, 4 El. 16.

(b) 4 Inst. 129.

This court, as appears by the preamble of the ^{Court of wards and liveries} act for establishing it, was not only for the ma- ^{erected.} nagement of wards properly so called, but also of idiots and fools natural in the king's custody, and also for licences to be granted to the king's widows to marry, and fines to be made for marrying without his licence. For managing such persons and their property, a court of record, with a seal, was thereby erected, to be called *The Court of the King's Wards*. A chief officer was to be appointed by the king, to be called *master of the wards*, who was to keep the seal; then another, called the king's attorney of the wards, the king's receiver-general of the lands of the wards, and two others to be called auditors of the lands of the wards. All lands, and other hereditaments whatsoever, belonging to such wards, were to be in the order, survey, and governance of this court. The master of the wards was authorized to issue such process as was then in use in the king's Duchy chamber of Lancaster, held at Westminster, for any matter or debt touching or arising from such property. He was to hold a court at the times of the four terms, and all process from the court of exchequer upon this head was in future to be void. The authorities through the act are mostly given to the master, with the advice of the attorney, receiver, and auditors: they had power to take recognisances, and to commit to prison. By stat. 33 Hen. VIII. c. 22. all transactions relating to the king's liveries were brought within the survey of this court, and the master of the king's wards was thenceforth to be *the master of the king's wards and of the liveries*: a person was also appointed, to be called surveyor of the king's liveries, who was to take precedence next before the king's attorney of the wards.

The stat. 33 Hen. VIII. c. 39. for erecting the court of surveyors of the king's lands, contains numerous provisions applicable to all the beforementioned courts, and also to that of the Duchy, and court of exchequer: we

shall take notice only of the following very general description of their jurisdiction. It was ordained, that all manner of debts, detinues, trespasses, accounts, reckonings, wastes, deceits, negligences, defaults, contempts, complaints, riots, quarrels, suits, strifes, controversies, forfeitures, offences, or other things, arising in, for, or upon any matter, cause, or thing, committed to the order and governance of any of these courts, wherein the king was only party; and also all manner of estates for term of years, between party and party, concerning the premises, were to be cognisable in these courts respectively, with power to correct and punish all persons convicted of any of the above offences. There was an exception out of the above general words, of all treasons, murders, and felonies, of estates, rights, titles, and interests, as well of inheritance as of freehold, other than jointures for term of life. All suits, bills, plaints, informations, declarations, complaints, answers, replications, allegations, causes, matters, and issues, were to be pursued, made, and tried in such several courts, by due examination of witnesses, writing, proof, or by such other ways or means as by the several courts should be thought expedient (a).

Such was the extensive authority given to these new tribunals, among which the court of wards and liveries was most distinguished, from the interesting nature of the subjects of cognisance there, which involved the concerns of so many of the king's subjects, in an article of such serious consequence to them and their families.

Some attention was paid by the parliament to the administration of justice; and several acts were passed, in order to remove obstacles, and expedite the proceedings and process of courts. Process of outlawry was allowed by stat. 23 Hen. VIII. c. 14. in actions on stat. 5 Rich. II. of forcible entries; and the process of debt allowed in actions of

(a) Sect. 57. 59.

covenant and annuity. By ch. 15. of the same statute, costs were given to defendants, upon nonsuit or verdict, with the same process and execution for recovery thereof as plaintiffs would have. This was in the following actions: on the statute of forcible entries, 5 Rich. II. in debt or covenant upon any specialty or contract, detinue of goods, in accompt, trespass on the case, and action upon a statute for a wrong to the plaintiff. There was a proviso added, that plaintiffs suing *in forma pauperis* should not, hereby, be made liable to pay costs, but should, instead thereof, suffer some punishment at the discretion of the justices; and this punishment, we are informed, was usually whipping (a). Again, it was provided, by stat. 24 Hen. VIII. c. 3. that this act should not give costs against any plaintiff suing to the use of the king. By stat. 24 Hen. VIII. c. 19. costs and damages are given to an avowant in replevin or second deliverance, if the plaintiff was nonsuit, or otherwise barred, in the same manner as the plaintiff would have recovered them. Where lands delivered in execution were evicted, a remedy by *scire facias* against the party or his executor is given by stat. 32 Hen. VIII. c. 5. to have the part of the debt unsatisfied, out of other lands belonging to him.

Provision was made by stat. 4 Hen. VIII. c. 4. Proclamations for proclamations on exigents in foreign coun-^{on exigents.} ties, which act was perpetuated by stat. 6 Hen. VIII. c. 4. It was thereby directed, that where in any action personal a defendant was described of one county, and an exigent was awarded into another, it should be lawful for the justices to award a writ of proclamation to the sheriff of the county of which the defendant was described; or if the king's writ runneth not there, then to the adjoining county. The proclamation was to contain the effect of the action, and to direct the sheriff to make three proclamations within

(a) Salk. 306.

his county at three different days, two in full county-court, the third at the general sessions, requiring him to yield himself to the sheriff of the foreign county into which the exigent was awarded. Such proclamation was to have the same return as the exigent, and to be made out by the same officer. Any outlawry promulged in a foreign county, without award of such writ of proclamation, was declared void.

Several regulations were made respecting jurors, as well to secure a regular appearance of them at the trial, as to guard against or to punish perjury and misbehaviour. Two of these parliamentary provisions were confined to jurors in London. In the former reign (a), it had been endeavoured to enforce appearance by larger issues: there being some doubt, how these were to be levied, it was now directed (b), that the mayor might distrain for them. This was confined to actions in the city courts. By the last it was ordained, to prevent delays for want of jurors, that in all city actions depending in the courts at Westminster, the sheriffs might summon persons having goods to the value of 100 marks, as well as those having lands or tenements of forty shillings value annually. It further directs, what issues should be returned on the first and second distress, and all the subsequent ones (c).

A more general provision was made by stat. 35 Hen. VIII. c. 6. to effect a due appearance of jurors at *nisi prius*. It was ordained, that where the jurors, upon an issue joined, in a court at Westminster, were to have forty shillings freehold, the *venire facias* should specify *quorum quilibet habeat quadraginta solidatas terræ, tenementi, vel redditus ad minus*; and the sheriff was not to return persons who were not so qualified. In cases which did not require that clause, he was not to return any that

(a) Vid. ant. 143.

(b) Stat. 4 Hen. VIII. c. 3.

(c) Vid. also stat. 5 Hen. VIII. c. 5.

had not some freehold; and in both cases, he was to return six sufficient hundredors, at least, if there were so many within the hundred. Upon every first *habeas corpora*, or *distringas*, with a *nisi prius*, the sheriff was to return at least five shillings; at the second, ten shillings; at the third, thirteen shillings and fourpence; and upon every subsequent one he was to double the issues, till a full jury was sworn, or the process otherwise determined. If a full jury should not appear, or after challenges there was likely to be a default of jurors, the justice, at request of the plaintiff or defendant, might command the sheriff to name and appoint as many persons of the same county, then present at the assises or *nisi prius*, as would make up a full jury, who should be added to the pannel, and their names annexed to it: these were to be liable to challenge, as if they had been impannelled on the *venire facias*; and if they made default, they might be fined as jurors at common law. The jurors first impannelled were nevertheless to lose their issues, the same as if the jury had remained for default of jurors, unless they were excused upon any reasonable cause by the justice; in like manner, if the jury was not taken by reason of the not coming of the justices. The subsidiary jurors added, according to the directions of this act, constituted what were called *tales de circumstantibus*, and they were mentioned under that appellation, in stat. 37 Hen. VIII. c. 22. made for continuing this act, which was only temporary.

Now we are upon the subject of jurors, we may introduce a statute made for altering the proceedings in attaint. We have observed, in the last reign, that the parliament had provided a new way of punishing jurors, and had foregone the ancient villainous judgment in attaint (a). That statute was only experimental; and there-

Attaint.

(a) Vid. ant. 143.

fore after being continued by one at the beginning of this reign, was suffered to expire in the third year of this kings (a). Attaints, therefore, again returned to their ancient course, till stat. 23 Hen. VIII. c. 3. which renewed the policy of the act of the last reign, in the following manner: In every case of an untrue verdict, between party and party, in any suit, plaint, or demand, before judges of record, where the thing in demand was worth forty pounds, and did not concern a man's life, the party grieved might have an attain against the jurors and the party; with summons, resummons, and distress infinite against them, and also the grand jury. Every one of the grand jury was to have freehold of the yearly value of forty shillings. The distress against the grand jurors was to be awarded, and open proclamation was to be made, and this was to be fifteen days before the return of the distress. If the party or any of the petit jurors made default, the grand jury was to be taken against every one so making default. Those who appeared, were to have no answer to the plaintiff, except *that they made true serement* (provided they were the same persons; and the writ, process, return, and assignment, were good and lawful), and the party was to plead that *they gave a true verdict*; and if they pleaded in bar, the grand jury was still to go on to enquire whether the first jury gave a true verdict. If the jury were convicted, each of them was to forfeit twenty pounds, half to the king, and half to the party grieved; they were also to be fined at the discretion of the justices, and their oath never more accepted in any court: the party's plea being also found against him, the plaintiff was to be restored to what he had lost, with reasonable costs and damages. It was ordained, that outlawry or excommunication of the plaintiff should be a void plea, not to be

(a) Stat. 1 Hen. VIII. c. 24.

answered. In process of attaint, day was to be given as in a writ of dower, and no essoin or protection to be allowed. An attaint was not to abate for the death of the party, or any of the jury.

If the verdict was for a personal thing, as debt, trespass, or the like, under forty pounds, there was to be the same process and pleas, and delays were in the same manner to be removed: only the qualifications of the grand jury need not exceed five marks yearly of freehold, or the property of one hundred marks of goods and chattels; and the petit jurors, if attainted, were to forfeit only five pounds, and also make fine and ransom.

In either case, if there were not sufficient qualified jurors, a *tales* might be awarded into the next county. The remedy of this statute was also extended to persons grieved by any untrue verdict of inheritance in descent, or of freehold or inheritance in reversion or remainder. If the plaintiff was nonsuit, or discontinued, he was to make fine by the discretion of the justices. All attaints were thenceforward to be taken in the king's bench or common-pleas, and, in no other court; and *nisi prius* might be granted by the justices upon the distress: every petit juror might appear by attorney.

There is a proviso, declaring; that this statute shall not prejudice the act of the last reign (*a*), respecting attaints in the city; but that attaints might be either brought there in the hustings, or under this act. To obviate some infringement which it was apprehended the city-privileges might undergo by the general form of this act, it was in a subsequent statute declared (*b*), that in attaints for verdicts given by citizens, the jurors need no qualification of freehold, but only to have 400 marks in value of goods and chattels; and, further, that the justices should sit

(*a*) Stat. 11 Hen. VII. c. 21. Vid. ant. 143. (*b*) Stat. 37 Hen. VIII. c. 5.

at Guildhall, or elsewhere, in the city, to try such attainments (a).

Such was the new form into which this ancient proceeding for punishing the perjury of jurors was now thrown: it has been treated very fully in the early parts of our History; and when it underwent so important a revolution, it seemed proper that such changes should be recounted equally at large.

Statute of Jeofail. The attaining of substantial justice was promoted by a new statute of amendment and jeofail: this was stat. 32 Hen. VIII. c. 30. which took away some of the minute causes of exception to which records and proceedings were before liable. It ordains, that after verdict judgment shall be given, notwithstanding any mispleading, lack of colour, insufficient pleading, or jeofail, any miscontinuance, discontinuance, or misconveying of process, misjoining of the issue, lack of warrant of attorney of him against whom the verdict is, or any other default, or negligence of any of the parties, their counsellors, or attornies; nor shall any writ of error, or of false judgment, be maintainable on account of any of the defects above-mentioned. By the same statute, attornies are required to deliver their warrants of attorney to be entered of record, the same term the issue is entered, under penalty of 10*l.* and imprisonment at the discretion of the court. After this act, much room was still left for the parliament to interpose on the same subject, as has been since done by many statutes of greater extent than the present.

While these provisions were made to prevent the failure of actions on account of trifling defects in the proceed-

(a) It appears from the preamble of this statute, that the city privilege about trials run thus: That inquisitions of the citizens of London should be taken at St. Martin's le Grand, or at the Guildhall of the city of London, and not elsewhere, except inquisitions before the justices in eyre, at the tower of London, and for the delivery of the gaol of Newgate.

ings, the ancient strictness was still preserved in criminal prosecutions: in these it was thought not inconvenient to allow any exception which could, upon any fair pretence, be taken in favour of the life or liberty of a defendant, after conviction. But the stat. 37 Hen. VIII. c. 8. ordained, that, for the future, the words *vi et armis, videlicet, cum baculis, cultellis, arcubus, et sagittis*, or any of the same or like words, if omitted in an indictment or inquisition, shall not be a cause to avoid such indictment or inquisition, by writ of error, plea, or otherwise. A doubt has been raised on the construction of this statute; whether it was meant to extend to all the words there recited, or only to those which come under the *videlicet*. This has prevented the full benefit that otherwise might have been derived from this only statute of jeofail which relates to criminal proceedings.

As the end of all laws is the quiet and peace of society, the limiting a period of time within which persons must pursue their remedy by action, was a wise and politic constitution. Some statutes were made for the limitation of actions (a). The cruel proceedings upon penal statutes in the last reign, made it necessary to fix some bounds to common informers. By stat. 1 Hen. VIII. c. 4. actions on penal statutes were to be brought by the king within three years, and by any common person within one. This act being temporary, was continued by stat. 7. Hen. VIII. c. 3.

A more general provision was made for limitations in several real writs, by stat. 32 Hen. VIII. c. 2. which states in the preamble, two inconveniencies from the present length of limitation: one is, that it was above the remembrance of any man to try and know the certainty of the point in issue; and that persons, though they and their ancestors had been in long possession, could not enjoy their estates in safety. To remedy this, the following alterations were made: That no person should sue a

Statute of limitation.

(a) Vid, ant. vol. II. 124.

writ of right, or make prescription, title, or claim, alleging the seisin of his ancestor, any otherwise than within threescore years before the *teste* of the writ, or before the prescription, title, or claim made: That no person should maintain an assise of mortuance, cosinage, aiel, writ of entry upon disseisin done to an ancestor, or any other action possessory of any further seisin of himself or his ancestor, but within fifty years before the *teste* of the writ; nor of his own seisin, above thirty years before the *teste* of the writ; nor should avow or make cognisance for any writ, suit, or service, alleging a seisin thereof in himself, his ancestor, or any one whose estate he had, above fifty years next before the making of the avowry or cognisance. All formedons in reverter and remainder, and every *scire facias* on a fine, was to be sued, used, and taken, within fifty years after the title and cause of action accrued; and if a writ was brought, prescription, title, claim, avowry, or cognisance, was made any otherwise, and was traversed, and found against the person so doing, he was to be barred for ever.

Trinity term altered. Among the provisions relating to the administration of justice, we must not forget one for bringing Trinity term more forward in the year. This was stat. 32 Hen. VIII. c. 21. which states two reasons for such a change: first, that in this season there had often happened the plague and other sicknesses; secondly, that it was a great impediment to poor people who ought to be employed about their harvest. It was therefore thought proper to take off the two last returns, and, instead, to add one to the beginning of the term (a). For this purpose it was enacted, that this term should have only four common returns; the first of which was to be *in crastino Sanctæ Trinitatis*; the second, *in octabis Sanctæ Trinitatis*; the third, *in quâdenâ Sanctæ Trinitatis*, as before; but the fourth was to be *a die Sanctæ*

(a) See the Diagram exhibiting the returns as they were last adjusted by the stat. *Dies communes in Banco*, 52 Hen. III. ant. vol. II. 58.

Trinitatis in tres septimanas, which was to take its commencement from Trinity Sunday into three weeks next following, and was to have its return with the fourth day next following, as was usual in the other returns; and the returns *in crastino Sancti Johannis Baptistæ*, *in octabis Sancti Johannis Baptistæ*, and *in quindenâ Sancti Johannis Baptistæ*, were thenceforward to be abolished. It was ordained, that this term should begin the Monday next after Trinity Sunday, for the keeping of essoins, profers, returns, and the other usual ceremonies; and that the full term should commence on Friday next after *Corpus Christi* day. When this alteration was made, another was also necessary for adjusting the relation the term, after this modification, was to bear with the others. In the old scale, settled by the stat. *Dies communes in Banco*, all writs issued in Hilary term, and those of no other, were returnable on some of the returns in Trinity term; and all those issued in Trinity, fell upon some return in Michaelmas: this relation was still preserved, but it was ordered in this way. If any writ, in a real action, was returnable *in octabis Hilarii*, then day was to be given *in crastino Sanctæ Trinitatis*; if *in quindenâ Sancti Hilarii*, *in octabis Sanctæ Trinitatis*; if *in crastino Purificationis Beatæ Mariæ*, *in quindenâ Sanctæ Trinitatis*; if *in octabis Purificationis Beatæ Mariæ*, then *a die Trinitatis in tres septimanas*. Again, if *in crastino Sanctæ Trinitatis*, *in crastino Annarum*; if *in octabis Sanctæ Trinitatis*, *in crastino Sancti Martini*; if *in quindenâ Sanctæ Trinitatis*, *in octabis Sancti Martini*; if *a die Trinitatis in tres septimanas*, then *in quindenâ Sancti Martini*.

Provision was likewise made, as in the reign of Henry III. to adapt this alteration to the return of writs of dower. If a writ of dower was returnable *in quindenâ Paschæ*, day was to be given *in crastino Sanctæ Trinitatis*; if *a die Paschæ in tres septimanas*, *in octabis Sanctæ Trinitatis*; if *a die Paschæ in unum mensem*, *in quindenâ*

Sanctæ Trinitatis; if *a die Paschæ in quinq; septimanas*, or in *crastino Ascensionis*, then *a die sanctæ Trinitatis in tres septimanas*. Again, if in *crastino Sanctæ Trinitatis*, then in *octabis Sancti Michaelis*; if in *octabis Sanctæ Trinitatis*, in *quindenâ Sancti Michaelis*; if in *quindenâ Sanctæ Trinitatis*, *a die Sancti Michaelis in tres septimanas*; if *a die Sanctæ Trinitatis in tres septimanas*, then *a die Sancti Michaelis in unum mensem*, or otherwise, says the act, as it is appointed by the statute of Marlbridge. Thus far of real writs. It was ordained, further, that all common writs and processes, as well personal as mixèd, returnable in Trinity term, should be returnable on some of the four returns directed by this act. The justices, however, in such and the like cases and processes, where special days had been used to be appointed for the return of writs and processes, were authorized to continue to appoint special days as it seemed convenient to them. The days appointed to be given in *quare impedit* by the statute of Marlbridge, and in attaint by stat. 5 Ed. III. c. 7. as far as they were not contrary to this act, were still to continue.

CHAP. XXIX.

HENRY VIII.

Many new Treasons created—Treason by writing or speaking—to disobey the King's Proclamations—Statute of the Six Articles—Punishment of Poisoning—Of Larceny—Servants embezzling Goods—Larceny in a House—Law against Gypsies—Cheating by false Tokens—Gaming—Trial of Treason committed in Wales—and committed out of the Realm—Trial of Piracy—Trial of Bloodshed in the Palace—The Benefit of Clergy taken away—The Question of Clergy debated before the Council—The King's Determination—Abjuration and Sanctuary—Clergy again taken from certain Offenders—Sanctuary taken from certain Offenders.

THE law of crimes and punishments began to assume a very different appearance. An alteration in circumstances, and an alteration in sentiments, induced the parliament to give a keener edge to the law, in many cases. To suffer such offences as murder and robbery, larceny, burning, and other crimes, to enjoy impunity, through a peculiarity in legal notions, or defects in the course of justice, was thought too inconsistent with the good order and peace of society to be any longer endured. Many statutes were made for the due punishment of such enormities. Besides this modifying of common-law offences, the character of the times, and that of the prince upon the throne, contributed to the enacting of many new crimes, with new methods of trial and punishment; all which, together, exhibit a greater shew of novelty than had been

introduced in our criminal law in any of the preceding reigns.

The penal statutes of this reign may be naturally divided into such as concern religion, and the king's person and government; those which regard inferior offences; and such as make any change in the mode of trial at common law, or in any other way affect the punishment of offenders; and, lastly, those that respect the benefit of clergy and sanctuary.

The penal acts relating to the king's person and government, and to the alteration made in religion, constitute the first head of enquiry: these were all repealed by stat. 1 Ed. VI. c. 12. and not one of them has any influence on the body of our law in force at this day. Notwithstanding this, they are extremely worthy of observation, when considered in an historical light. These laws were intirely of a new impression, totally differing from any that had gone before, both in the description of crimes, and the severity with which they punished them. In these statutes treason and misprision of treason were made the consequence of every action and every word that tended to affect the regal dignity; the obedience of men was secured by oaths, and the discovery of guilt facilitated by methods unheard of in the common law. Though these statutes were all abrogated, yet the offences therein created were revived in the subsequent reigns, with inferior penalties; and many of their regulations were followed in similar circumstances: so that these laws gave rise to a new species of criminal jurisprudence, which has been adopted occasionally ever since; tempered, however, with greater shew of moderation. For these reasons, as well as to display their peculiar stile and extravagance, we shall treat them fully, and that nearly in the order in which they were made.

It was not till the 25th year of his reign, that Henry had involved himself in measures which forced him to such acts of violence, as marked his government for

sanguinary and tyrannical. Having parted with his queen *Catharine*, embroiled himself with the Emperor and the Pope, and taken the resolution of throwing off the papal yoke, he found himself under a necessity of securing what he had done by an act of parliament, which was to confirm the divorce, and the marriage with *Anne Boleyn*, and to settle *the succession* of the crown upon the issue of that marriage. Stat. 25 Hen. VIII. c. 22. was passed for this purpose. After giving the sanction of parliament to the steps which had been lately taken by the king respecting his two queens, it enacted, that if any person by writing, or imprinting, or by any exterior act or deed, maliciously procured, or did any thing to the peril of the king's person; or gave occasion, by writing, print, deed, or act, whereby the king might be disturbed of the crown; or by writing, print, deed, or act, procured, or did any thing to the prejudice, slander, or derogation of queen Anne or her issue by the king, so as to interrupt their title to the crown, as limited by that act, such offence should be high-treason. And if any persons, *by words only*, should publish or utter any thing to the peril of the king, or slander of the marriage with queen Anne, or to the slander or disherison of the issue of that marriage, it was made misprision of treason. All persons of full age were to take an oath to fulfil and maintain the objects of that act; and those who refused to take such oath, when required, were to be held guilty of misprision of treason; the precise form of which oath was afterwards prescribed by stat. 26 Hen. VIII. c. 2.

Treason by
writing or
speaking.

When the way was once pointed out of surrounding the king's person and dignity with new-made treasons, and of binding people to their duty and allegiance by express and formal oaths, we shall presently see how ready the parliament was, on every occasion, to fabricate and alter, as circumstances changed, these fresh devices for the security of government and religion.

In the very next year an act was passed, in order to restrain "all manner of shameful slanders and dangers which might happen to the king's person, or that of the queen." It was by stat. 26 Hen. VIII. c. 13. made *high-treason*, if any one did maliciously *wish, will, or desire by words*, or writing, or by craft imagine, invent, practise, or attempt any bodily harm to the person of the king, queen, or of their heir apparent, to deprive them of their dignity, title, or name; or if any did slanderously and maliciously publish and pronounce, by express writing or words, that the king was heretic, schismatic, tyrant, infidel, or usurper (which latter words were intended to bridle the insolence of some friars); or if any withheld from the king his castles, fortresses, or holds, or rebelliously detained any of his ships, ordnance, artillery, or munition, and did not deliver them up within six days after proclamation. This act, besides taking away sanctuary in cases of high-treason, increased the forfeiture upon attainder, by declaring, that all lands, tenements, and hereditaments, *of any estate of inheritance*, in use or possession, should be forfeited; which words included estates tail.

By the last act, we find that not only *exterior acts and deeds* (as the preceding statute expressed it), and writing, but *words* expressive of a *wish* were made treason. We shall soon see that the legislature laid the same penalty upon the *thoughts* or *belief* of men (*a*), if expressed by words. After stat. 27 Hen. VIII. c. 2. which made it treason to counterfeit the king's sign-manual, privy-signet, or privy-seal, there follows stat. 28 Hen. VIII. c. 7. made for *the succession of the crown*, after the death of *Anne Boleyn*, and the king's marriage to his queen *Jane*. The former act of succession was thereby repealed; and now, similar provisions were made in favour of the issue and succession by this new marriage. The king being empowered, in de-

(a) Stat. 28 Hen. VIII. c. 7. 21.

fault of issue, to appoint a successor, by letters patent or by will, it was made high-treason to interrupt the succession of the issue, or of the persons so appointed by the king (a). It was made high-treason to procure or do any thing, by words, writing, print, or deed, *for the repeal* or avoidance of that act; and the slander of the queen and her issue, or the doing any thing to the peril of the king's person, was made high-treason, in the very terms of the former act of succession. It was moreover made high-treason, if any one by words, writing, imprinting, or any other exterior act, directly or indirectly, accepted, took, *judged*, or *believed*, the marriages with queen *Catharine* and *Anne* to have been good and lawful: or slandered the sentences of the archbishop therein; or took, accepted, named, or called any of their children legitimate; or craftily imagined, invented, or attempted, by colour of any pretence, to deprive the king, queen, or their heirs, or those the king should appoint, of any of their titles, styles, or regal power.

But the most singular part of this act was the following clause, which enacted, that if any, being required, by commissioners properly authorized, to make oath to answer such questions as should be objected to him upon any clause, article, sentence, or word in that act, *did* contemptuously *refuse to make such oath*, or, after making it, *refused to answer*, he should be guilty of high-treason: a species of examination unknown to the ancient common law of the country. The act even goes further, and says, that "if any protested, that they were not bound to declare their thought and conscience, and stiffly thereon abided," it should be high-treason; so little ashamed were the makers of this act to be confronted with the mischiefs that would naturally ensue from it; and so ready were they to undertake the cruel task of obviating

the consequences of former severities by imposing new ones. This act contained one more treason; which was, in case any one refused to take the oath prescribed for the observance of it; the former oath of a similar import being repealed and dispensed with (*a*). The matter of this act was so various, and of such a peculiar kind, and the manner in which it might be enforced so insidious, that it became an engine in the hands of government, by which they might catch any man whom they wished to destroy. This act is a strong instance how absolute Henry had become, when the parliament conferred on him the power to dispose of the succession to the crown.

This was followed by an act (*b*) to extinguish the authority of the bishop of Rome. There is a long preamble, stating the usurpations of the Pope in spirituals and temporals; and that, notwithstanding the laws which had lately been made, "divers seditious and contentious persons, "being imps of the said bishop of Rome, do, in corners "and elsewhere, whisper, inculke, preach, and persuade, "and from time to time instill into poor and unlettered "people the advancement and continuance of the said "bishop's feigned and pretended authority." For these reasons it was enacted, that if any one by writing, cyphering, printing, preaching, or teaching, deed or act, obstinately or maliciously held or stood with, to extol, set forth, maintain, or defend, the authority of the bishop of Rome, or invented any thing for the advancement of it, he should incur the penalties of stat. 16 Rich. II. c. 5. that is, a *præmunire* (*c*); being a process originally contrived for repressing the incroachments of papal power. To engage all persons in an express obligation to support the king against the Pope, an oath was framed, by which the taker renounced the Pope and all his authority and jurisdiction; and this oath was to be taken by all officers and ministers

(*a*) Sect. 24, 25. (*b*) Stat. 28 Hen. VIII. c. 10. (*c*) Vid. ant. vol. III. 166.

spiritual and lay; every religious person; all those who took orders, or any degree in the university; and it was made high-treason to refuse this oath when it was required to be taken: so that all hopes of reconciliation with the church of Rome seemed cut off by this statute.

That the king's power to dispose of the crown might not be thwarted or interrupted by the marriage of any of his family against his will, it was, by stat. 28 Hen. VIII. c. 18. made high-treason, both in the man and woman, if any one espoused, married, or took to wife any of the king's children, being lawfully born, or otherwise commonly reputed for his children; or any of the king's sisters, or aunts on the part of the father; or any of the lawful children of the king's brethren or sisters, or even to contract marriage with them, without the king's licence under the great seal; or to deflower any of them, being unmarried. These were the penal laws made in this short parliament, in the 28th year of the king.

The next treason that was made, was to enforce obedience to the king's proclamations. To disobey the king's proclamations.

The late proceedings of the king about the Articles of Religion, and other injunctions which had been published by his sole authority, had been excepted against as contrary to law; because the king had, without consent of parliament, altered some laws, and laid taxes on his spiritual subjects (a). This occasioned the famous statute 31 Hen. VIII. c. 8. The preamble of this act sets forth "the contempt and disobedience of the king's proclamations by some who did not consider *what a king by his royal power might do*; which, if it continued, would tend to the disobedience of the laws of God, and the dishonour of the king's majesty, who may full ill bear it. Considering also that many occasions might require speedy remedies, and that delaying these till a parliament met, might

(a) Burn. Ref. vol. I. 251.

" occasion great prejudices to the realm ; and that the king, " by his royal power *given of God, might do many things* " in such cases ;" it was therefore enacted, that the king for the time being, with advice of his council, might set forth proclamations, with pains and penalties in them, which were to be obeyed as if they were made by an act of parliament. This, however, was not to go so far as that any one should suffer in his estate, liberty, or person, by virtue thereof ; nor that by any of the king's proclamations, the laws or customs of the realm should be subverted. The statute directs the method in which these proclamations were to be issued, and how those should be punished who disobeyed them ; and then adds, that if any offended against them, and, in further contempt, went out of the kingdom, it should be high-treason. The same power of issuing proclamations was given to the counsellors of the king's successor while under age, with the like penalties for disobeying them ; a power of which the Protector, in the next reign, availed himself, in order to bring about the changes in religion (a).

Statute of the six articles. In the same parliament was passed the famous act of the six articles, stiled, "*An Act for abolishing Diversity of Opinions,*" by which the parliament enacted six of the strongest points in the Romish religion, under the severest penalties. The preamble says, that " the king hoped that a full and perfect resolution of the said " articles should make a *perfect concord and unity amongst* " *all his subjects.*" The ready way to effect this, it was thought, would be, to establish them by law, since the convocation of bishops and learned men had agreed upon them as settled orthodox doctrine. It was therefore enacted, by stat. 31 Hen. VIII. c. 14. *first*, that if any one by word, writing, printing, cyphering, or any otherwise, did teach, preach, dispute, or hold opinion against the real presence,

(a) Burn. Ref. vol. L 252.

he should suffer death as a heretic by burning, and forfeit as in case of high-treason; *secondly*, that if any one preached in any sermon, or collection openly made, or taught in any common school or congregation, or obstinately affirmed or defended that the communion in both kinds was necessary; or *thirdly*, that priests might marry; or *fourthly*, that vows of chastity might be broken; or *fifthly*, that private masses should not be used; or *sixthly*, that auricular confession was not expedient; it should be adjudged felony. To these it was added, that if any priest, or any other who had vowed chastity, did marry, or contract matrimony; or if any priest who was or should be married, did carnally use his wife, or any woman to whom he was contracted, or *was openly conversant or familiar with*, both the man and the woman should be guilty of felony. This severe branch against unchaste practices was not relished by the popish clergy, and is said to have been put in by *Cromwell*, to make this bloody law cut with two edges. If that was the design, the clergy got relieved from this well-intended stroke the next year; when, by stat. 32 Hen. VIII. c. 10. this latter part of the law was changed from felony to forfeiture and imprisonment.

After this act of the six articles, there was another brought in by *Crammer*, which was intended to mitigate the late laws about religion. In this measure the king very readily concurred, being then engaged in a war, and wishing every thing to remain quiet at home. This was stat. 34, 35 Hen. VIII. c. 1. intitled, *An Act for the advancement of True Religion, and abolishment of the contrary*. One design of this provision was to put a stop to the use of *Tindal's* translation, and to promote the reading the authorised translation in English; after which it enacted, that if any spiritual person did preach, teach, defend, or maintain, any matter or thing contrary to the good instructions and determinations *that had or should be set forth* by the king, he should, for the first offence, recant; if he refused to recant, or offended a second time,

he was to abjure, and bear a faggot; which if he refused to do, or offended a third time, he was to be burnt as a heretic. But lay-persons so offending were, for the third offence, or for refusing to abjure, and bear a faggot, only to forfeit all their goods, and suffer perpetual imprisonment; so that the laity offending against the six articles and other popish doctrines, were intirely freed from the hazard of burning, and the spirituality suffered only on the third conviction. They were also permitted to bring witnesses in their defence (a).

The marriage between the king and *Anne of Cleves* being pronounced void, an act passed to confirm the sentence; and it was now declared, as it had been on former occasions of the same kind, that by word or deed to accept, take, judge, or believe, that marriage to be good, or to attempt to repeal that act, should be high-treason. This was by stat. 32 Hen. VIII. c. 25. In the following year, another of this whimsical monarch's unfortunate queens gave occasion to the penalty of high-treason being inflicted on transactions of a very nice and singular nature. Queen *Catharine Howard* was attainted by stat. 33 Hen. VIII. c. 21. of high-treason for incontinence; and it was enacted further, that if the king, or any of his successors, should marry a woman who was before incontinent, it should be high-treason if she concealed it; and any person knowing it, and not revealing it to the king, or one of his council, before the marriage, or within twenty days after, should be adjudged guilty of high-treason. Further, if the queen, or wife of the prince, should, by writing, message, words, tokens, or otherwise, move any one to have carnal knowledge with them, or any others should move either of them to that end, it should be high-treason.

A third act was made for the *succession* to the crown, which entirely overturned the former appointments; this was stat. 35 Hen. VIII. c. 1. There was a new oath,

(a) Burn. Ref. vol. I. 308.

devised in place of that before sworn, as well against the supremacy of the pope, as to maintain the succession ordained by that act. It was made high-treason to refuse that oath, or to do any thing contrary to this act, or to the peril and slander of the king's heir, as limited therein. The king's stile and title was settled by stat. 35 Hen. VIII. c. 3. in the following words: "Henry VIII. by the grace of God, King of England, France and Ireland, Defender of the Faith, and of the Church of England, and also of Ireland, in earth the Supreme Head;" and it was declared high-treason to attempt to deprive him of it.

This variety of penal laws shews a want of temper in the legislature, which is hardly to be paralleled. The passions and caprice of the king seemed to be adopted by the parliament, which condescended to enforce by statute every thing he could ask or wish; ordaining for law the strangest inventions that ever were thought worthy to become the objects of penal jurisprudence.

It follows, that we should now speak of such statutes as were made respecting common offences: these, though not so numerous as the former, were of considerable importance, and are many of them in force at this day. The variation made in the crime of larceny by some that have already been mentioned, requires a more particular notice; after these, we shall proceed to other felonies; and, lastly, to misdemeanours: but first it will be proper to consider two statutes relating to homicide, which are the only two in this reign upon that head.

One of these statutes was to remove a doubt concerning the killing a robber. We have seen, that in former times, a person killing a house-breaker went without punishment (a). But now, the statute 24 Hen. VIII. c. 5. says, there was "a question and ambiguity," whether, when persons attempted to commit robbery or murder, in or nigh the common highway, cart, horse, or foot way;

(a) Vid. ant. vol. II.

or in a mansion-house, messuage, or dwelling-place; or feloniously attempted to break a dwelling-house in the night-time, and were killed in such attempt by the person they meant so to rob or murder, or by any person being in their dwelling-house, so attempted to be burglariously broken; whether the person killing was to forfeit his goods, as in chance-medley: to remove this doubt, the statute declares, he shall not suffer any kind of forfeiture, but be as fully acquitted and discharged, as if he had been acquitted of the fact.

Punishment of poisoning. The other statute concerning homicide, is very remarkable; and as it enacted a new treason, it might perhaps have been ranked among that series of acts. This is stat. 22 Hen. VIII. c. 9. It was occasioned by one *Richard Roose*, a cook, having put some poison into a vessel of yeast, in the bishop of Rochester's kitchen, by means of which seventeen persons of the bishop's family, and several others, were poisoned, and died. This very heinous offence raised a kind of indignation in the legislature; and it was declared by that act, that the said poisoning should be adjudged high-treason, that *Richard Roose* should be attainted accordingly, by authority of parliament, and should be boiled to death; and, as if none would commit this offence but such as were of the same employment with the present offender, it was enacted, not only that thenceforth every wilful murder by means of poisoning should be high-treason, but that such offenders should all be boiled to death.

Of larceny. It became necessary that the crime of larceny should be punished in a severer manner than it had been at common-law. The occasions and temptations to commit this crime were much increased, since the improvements in arts and commerce had supplied the articles of personal property in greater number; and as those were often costly, and made a part of dress, or of the furniture of houses, there was need of additional penalties to guard them from violation. Besides these considerations, a

dwelling-house, on all accounts, deserved every protection the law could afford it. Stealing in this only place of security for a man's property, called for a more exemplary punishment; but more particularly when attended with violence of any kind. To these causes may be ascribed the statutes made in this and the subsequent reigns concerning larceny: what those were we shall now enquire.

The definition of larceny, after various changes, had, as we have seen in the reign of Edward IV. (a) become settled, in the following terms: *The felonious taking and carrying away of the personal goods of another.* In judging of offences, courts were tied up to this definition, and often found themselves embarrassed by a strict construction of it. To correct this, and to punish in a manner adequate to the crime, the aid of the legislature had sometimes been called in, to enlarge the terms of this definition in particular instances. Thus it was made larceny to steal hawks, by a statute of Edward III. and to steal records, by one of Henry VI. (b); neither of which being *personals*, could be brought within the letter of the above definition.

Those two statutes respected the *objects* of larceny. The stat. 21 Hen. VIII. applied to another part of this definition, and assisted in ascertaining, at least in one instance, what should be deemed a felonious *taking*. A breach of trust, and embezzlement of effects confided to the custody of a person, were thought not to be a *felonious taking and carrying away*. This kind of fraud had of late grown common, from the impunity it enjoyed; and many now thought, that, as it carried in it much of the mischief, it deserved the punishment annexed to felony. It was accordingly enacted, by stat. 21 Hen. VIII. Servants em-c. 7. that if a servant, to whom caskets, jewels, bezzling goods. money, goods, or chattels, have been delivered to keep,

(a) Vid. ant. vol. III. 410.

(b) Vid. ant. vol. II. 456. and vol. III. 279.

withdraw himself, and go away with the same, or any part thereof, with intent to steal, contrary to the trust and confidence reposed in him; or if, being in service, without assent of his master he embezzle the same, with intent to steal or convert to his own use, to the value of forty shillings, it shall be felony. It is mentioned in the preamble of this act, as a doubt whether this kind of taking was larceny; a doubt raised, perhaps, by the case determined in 13 Ed. IV. (a) which we have before mentioned, and which is thought, and not improbably, to have given some occasion for making this statute.

Though the instance of bailment there before the court was, or might be thought something like this of trusts reposed in servants, and was determined to be felony; yet the principles there laid down and agreed to, almost unanimously, led to an opposite conclusion; and there needed all the helps of distinctions and technical nicety to take even that case out of the general rule there laid down. Besides, there is at the bottom of that report an opinion, which qualifies any inference which otherwise might be possibly drawn from it as to this point; for, admitting that a cook and a butler would be guilty of felony, if they converted the goods within their respective departments to their own use, it is there said, that if the same things were bailed to a servant, *perhaps* (b), as they would be in his possession, he could not commit felony of them (c). About three years before it was said by one of the judges, "If one commits the care of his goods to his servant, the servant cannot take them feloniously, because they were in his possession (d)." These were direct authorities upon the point, and, joined with the reasoning upon *bailment* and *possession*, sufficiently shew what were the opinions of lawyers in those times respecting this question.

(a) Vid. ant. vol. III. 410. (b) *Per aventure*. (c) 13 Ed. IV. 10.

(d) 10 Ed. 14. Bro. Coro. 155. Vid. ant. vol. III. 410.

So strictly have courts adhered to the notion of possession, and its consequences, that in 3 Hen. VII. the judges went so far as to agree with *Brian* (who, it may be observed, was one of the judges that dissented from the opinion of felony in 13 Ed. IV. in the exchequer-chamber,) that neither a shepherd nor a butler could commit larceny of their sheep or plate, because it could not be done *vi et armis* (a); so much were the opinions changed from what they had been in the reign of Ed. IV. when these cases were stated for felony, and allowed without debate. This doctrine we have seen was again discussed in the last reign; and it seemed, in the instance there stated, to be agreed upon so decidedly against the felony, as to call for a formal declaration of the law by statute. Thus stood the law upon this subject towards the end of Henry VII.'s reign, and so we may suppose it was understood at the time this statute was made. After all these authorities, we may be excused in differing from those (b) who think that the point of law which is the subject of this statute, was so well settled before, that the doubt about it mentioned in the preamble is one of those which have much enervated the principles of the common law, and could not be the doubt of any lawyer.

Clergy was taken from this new felony by stat. 27 Hen. VIII. c. 17. which statute was excepted in the general repealing law, stat. 1 Ed. VI. c. 12.; but because the commencement of the sessions was mis-recited, it was held (c), that the saving was of no effect: so that stat. 27 Hen. VIII. c. 17. stood repealed, and stat. 21 Hen. VIII. c. 7. continued a clergyable felony, till the general repealing act of queen Mary, where, among other felonies, it was repealed: it was afterwards revived by stat. 5 Eliz. and is in force at this day.

Thus far the definition of larceny was extended in some particular cases as to the *object* of it, and the *mode* of

(a) Bro. Coro. 137.

(b) Barr. Stat. 478, 479.

(c) Plowd. 399.

taking. There was another consideration of this offence which deserves notice; and that was, *the circumstances under which it might be committed.*

Larceny in a house. The time or place where a theft was committed made no part of the legal notion of it. Whether it was in a house, or from the person (unless from the person violently, and by putting in fear, for then it was robbery, a crime of a very different nature), the additional audacity of the offender constituted in law no additional degree of guilt: so the law had been for many centuries. The attendant circumstances of aggravation under which this crime might be committed, drew the notice of the legislature now, for the first time. In this and the subsequent reigns many laws were made concerning *stealing in a house*, making altogether a collection of statutes so very similar, as to render it difficult to distinguish the different aim and object of some of them.

These statutes we shall hereafter notice among those which took away clergy; but we must touch on them now, with a view of pointing some observations to the subject we are upon at present. The first of them is stat. 4 Hen. VIII. c. 2. which took away clergy from all felonies committed in a church, or hallowed place; from robbery or murder in the highway, or *in a house*, the owner, his wife, child, or servant, within, and put in fear. This new regulation being a temporary law, was suffered to expire; and these offenders were left once more to their former impunity; till stat. 29 Hen. VIII. c. 1. took away clergy from those who *rob any person in his dwelling-house*, the owner, his wife, child, or servant, then being within, and put in fear. It takes away clergy also from those who rob any church or chapel, or other holy place; from murder; robbery in or near the highway; from burning a dwelling-house, or barn with corn or grain; and from petit treason. This statute includes also accessaries before the fact.

There is something in the wording of this statute that is worthy of observation: it is the different construction which has been put on the same expression when applied to different subjects; namely, *to rob*, when it is meant of a house, and when of a person. The words are, *if any rob any person in his dwelling-house*, &c. and *if any rob another in or near the highway*, &c.; the obvious and plain construction of which clauses, on the first view, should seem to be, that the locality of the offence *in or near the highway*, or *in a dwelling-house*, were the only circumstances particularly necessary to be defined.

But doubts arose, soon after the statute, whether the parliament had not something more in view than a mere robbery *from the person in a house*, and did not really intend by those words to signify the robbery *of a house*. To explain this doubt, and give this act the full effect which, probably, it was at first intended to have, the stat. 5 and 6 Ed. VI. c. 9. was made to explain the very passage now under consideration, concerning which there had arisen some doubts: to resolve which that act declares, that though the owner be *in any part* of the house, or *precinct* of the same, yet still the robber should lose his clergy. After this explanation, the difference between robbing a person *in the highway* and *in a dwelling-house*, first originated. For what could this *robbing a person in a house* be? It could not be a robbery, properly so called, for that must be from the person, and with violence, which could not be the case here; for the explanatory words say, that the person might be in any other chamber of the house; nor could it be with violence, for the statute says, it might be committed while the person was asleep: which is a condition not compatible with the violence necessary to constitute a proper robbery. It only remained to imagine a kind of *constructive* robbery, by supposing the violence committed on the house, and not on the person. Consistently with this, robbing a person in a house has been construed to signify a violence done to

the house by *breaking*, as well as a stealing. Later statutes have pursued this notion, only expressing it less equivocally, in the phrase of *robbing a house*, instead of *robbing a person in a house*.

By stat. 33 Hen. VIII. c. 12. (a) clergy was taken away from persons stealing in any of the king's houses, whether with a breaking or without.

There is only one more statute relating to robbery, which we shall now mention. We have seen, that in an appeal, the party prosecuting not only procured a punishment to be inflicted on the offender, but also recovered the thing stolen. This was not so in an indictment; and as this mode of prosecuting was now more practised than formerly, it was intended to render it equally advantageous to the person resorting to it. It was accordingly enacted, by stat. 21 Hen. VIII. c. 11. that if a man robbed or took away any money, goods, or chattels, from the person, or otherwise, and is indicted, arraigned, and found guilty thereof; or otherwise attainted, by reason of evidence given by the party, or by procurement of the party so robbed, or the owner of the said money or goods; the person robbed, or the owner of the things, shall be restored to them; and the justices of gaol-delivery, or other justices before whom the conviction was, may award writs of restitution, in like manner as in an appeal.

Having thus gone through all the statutes of this king on the offence of larceny and robbery, we shall proceed to examine what new felonies were created. These are of a miscellaneous nature. It was made felony by stat. 22 Hen. VIII. c. 11. to cut down or break up any part of the *pow-dike*, and *oldfield dike*, in Norfolk, and the Isle of Ely; as it was also to sell, exchange, or deliver, any horse, gelding, or mare, to a Scotchman, by stat. 23 Hen. VIII. c. 16. or into Scotland, or the batable to the use of a Scotchman

was made felony, to be determined by the wardens of the *Marches*, by stat. 32 Hen. VIII. c. 6. It was declared felony by stat. 31 Hen. VIII. c. 2. to fish with nets, hooks, or baits, in any several pond, stew, or moat, with intent to steal fish, from six in the evening to six in the morning, against the will of the owners; or to break up the head of any such pond, stew, or moat, by day or by night, whereby any fish were taken or destroyed: and fishing in the above manner in the day-time was punished with imprisonment for three months. This was the first law which laid the penalty of felony upon any trespasses respecting fish.

Penal restrictions to protect these objects of diversion and pleasure, where the royal amusements were concerned, were carried further by another chapter of this same statute (a); the latter branch of which act deserves particular notice, because it seems to have furnished the provisions which were afterwards revived in the famous *Black Act* of (b) modern times, and was itself framed upon the policy of one made in the last reign (c). The following facts were made felony: to take in the king's grounds any egg or bird of a falcon, goshawk, or laner, out of the nest (which had been punished with a year's imprisonment by stat. 11 Hen. VII. c. 17.); to find or take up any falcon, jerfalcon, jerkin, sacer or sacerit, goshawk, laner or lanerite, of the king's, and having on it the king's arms and veryeles, and not to bring or send it within twelve days to the master of the king's hawks. Then follow the provisions concerning parks. To enter into any forest, chase, or park, of the king, queen, prince, or any of the king's children, or into any other ground of theirs, inclosed with a wall or pale, ordained for the keeping of deer, between the rising and setting of the sun, with the face hid, or covered with hood or visor, or painted, or otherwise disguised, to the intent not to be known, in order to steal deer, or drive any of them from the forest; or, at any time of the day, with the face

(a) Ch. 12.

(b) Stat. 9 Geo. I.

(c) Vid. ant. 144.

hid and disguised, to kill conies within any ground being the king's warren within any of the parks above-mentioned; or in the night to enter into any park, chase, or forest, or warren, of the above description, with intent to steal deer or conies, was made felony.

The stat. 37 Hen. VIII. c. 6. contains many penalties for the punishment of persons guilty of various species of malicious mischief. It was made felony to burn, cut, or destroy any frame of timber prepared for building a house. The penalty of 10*l.* to the king, besides treble damage to the party, was given in the following instances of wilfulness and malice: for cutting the head of any ponds, stews, or pipes of any conduit: burning a cart laden with merchandize, or any heap of wood prepared for making coals, billets, or talwood; the barking of fruit-trees; the cutting out the tongue of any beast; or cutting off the ear of any subject, otherwise than by authority of law, chance-medley, sudden affray, or adventure; some of which enormities have been punished in different manners by later statutes.

Among the number of misdemeanours for which various kinds of penalties were ordained in this reign, besides those just mentioned, such only as make the subject of the three following statutes, can deserve a place in this historical view of our laws: these are, stat. 22 Hen. VIII. c. 10. of Egyptians; stat. 32 Hen. VIII. c. 9. of selling pretended titles, and embracery of jurors; and stat. 33 Hen. VIII. c. 1. of cheating with privy tokens; with others concerning unlawful games and shooting.

Law against
gypsies. The first of these laws describes that set of people who were then new-comers in this country, as “outlandish persons calling themselves *Egyptians*, using no craft or feat of merchandize, who come into “this realm and go from shire to shire and place to place in “great company, and used great subtil and crafty means to “deceive the people, bearing them in hand, that they by “palmestry could tell men's and women's fortunes; and “thus many times by craft and subtilty had deceived the

“ people of their money, and also had committed many
“ heinous felonies and robberies.” This was the description given of these wanderers. It was now enacted, that if any such persons came within the realm, they should forfeit all their goods and chattels, and should leave the kingdom within fifteen days after command so to do, upon pain of imprisonment. All sheriffs and justices of the peace were empowered to seize their property for the king’s use. If they were to be tried for any felony, they were not to be entitled to the privilege of stat. 8 Hen. VI. which gave a jury *de (a) medietate lingue*. As to all those then within the realm, they had sixteen days to depart; and if they overstaid that time, they were to be imprisoned, and forfeit all their goods and chattels.

The stat. 32 Hen. VIII. c. 9. states the inconveniencies which ensued from maintenance, embracery, champerty, subornation of witnesses, sinister labour, buying of titles and pretended rights of persons not being in possession. It enacts, that all former laws against maintenance, champerty, and embracery, shall continue in force, and be put in execution; and it moreover enacts, that no one shall bargain, buy, or sell, any pretended rights or titles in lands or tenements; and if any such bargain, sale, promise, covenant, or grant, be made, and the seller has not himself nor his ancestors been in possession of the same, or of the reversion or remainder, or taken the rents or profits, for one whole year next before the sale, both buyer and seller shall forfeit the whole value of the land, half to the king, and half to the person who sues for it. A proviso was added, allowing persons in possession, by taking the yearly profits, to buy any pretended title or right of any other person. Maintenance of any suit, embracery of jurors, or subornation of witnesses, are severally punished, in addition to the penalty of former statutes, with a forfeiture of 10*l.* half to the king and half to the party suing, which must

(a) Vid. ant. vol. III. 280.

be within a year. The buying of pretended titles had grown more frequent, since uses had become so common; and thus gave occasion to this statute.

Cheating by false tokens. Cheating was at common law an offence punishable by fine, imprisonment, and pillory. Some new provisions are made by stat. 33 Hen. VIII. c. 1. respecting one species of it. This statute ordains, that if any one falsely and deceitfully obtain, or get into his hands or possession, any money, goods, chattels, or other things of another person, by colour and means of any false token, or counterfeit letter made in another man's name, and shall be convicted thereof by witnesses before the chancellor, or by examination of witnesses, or confession in the star-chamber, or before the justices of assise, of the peace, or by action in any court of record, he shall suffer any corporal pain (except death) which shall be adjudged. It should seem that no alteration was made by this statute in the offence, which remains as at common-law; only the jurisdiction over it was extended, and the power of punishing enlarged. Justices of assise and of the peace are authorised by process, or otherwise, to cause persons suspected of this offence to be taken and kept till the assises or sessions.

Gaming. Among the penal laws of this king we find some restrictions imposed upon certain diversions with a more strict hand than the legislature had applied in any former time. Gaming and the killing of game were the objects of several acts of parliament. The two acts that aimed directly at the latter, were intended rather for repressing the depredations of those who have since been called poachers (a), than to circumscribe the amusement of the sportsman. By stat. 14 and 15 Hen. VIII. c. 10. no person of whatsoever estate, degree, or condition, was to trace, destroy, or kill any hare in the snow; justices of peace in their sessions, and stewards of leets, had authority to inquire of such offenders, and to fine them 6s. 8d. for every hare killed.

(a) Vid. ant. vol. III. 216.

The stat. 25 Hen. VIII. c. 11. was for the protection of wild-fowl, which used to be taken while the old were moulting, and while the young were not able to fly. To prevent this, it was ordained, that between the last day of May and of August, none should take wild-fowl in nets, or other engines, on pain of a year's imprisonment, and fourpence fine for every fowl, to be inquired of by justices of the peace. There was a proviso, that any gentleman, or other who can spend forty shillings per annum of freehold, might hunt and take them with spaniels, without using any net or engine, except it was a long bow. There were penalties also on those who took their eggs.

This exception in favour of the long-bow was in the same spirit which the legislature manifested in the last reign and in this, by several provisions made before and after this act. This martial weapon, which the English archers were so famous for managing, had lately been going out of repute; and cross-bows and hand-guns were now the fashionable instrument, whether for diversion or use. These new-invented weapons, from their commodious form, had been applied to the destruction of game, which was an additional reason for endeavouring to discourage them, and to bring the long-bow again into vogue. To effect this, several acts were made, which, by a side-wind, became in effect so many game-laws. In the preamble of stat. 19 Hen. VII. c. 4. the unlawful application of the cross-bow to kill the king's deer, and the universal disinclination to use the long-bow, that had made us once so formidable to our enemies, is very strongly and feelingly stated; and it is there enacted, that no person, without the king's special licence, under his placard, signed and sealed with his privy-seal or signet, should occupy or shoot in any cross-bow (unless he shot out of a house for defence thereof), except he be a lord, or have lands of freehold of 200 marks per annum, on pain of forfeiting it, with its apparel, to any person who would take it. By stat. 8 Hen. VIII. c. 13. the

qualification was raised to 300 marks, and all licences granted before that act are declared void. Hitherto the statutes were confined to cross-bows; but stat. 6 Hen. VIII. c. 13. prohibited shooting either in cross-bows or hand-guns; which latter, probably, were just come into fashion: besides forfeiture of the instrument, there was a penalty of 10l.: no man was to keep such instruments in his house on pain of imprisonment, and a penalty of 10l. All placards were declared void, and the offence was to be examined before the council, as well as before justices of the peace. By stat. 14 and 15 Hen. VIII. c. 7. the qualification was lessened to 100l. per ann. in a man's own right, or the right of his wife; and the penalty was lowered to forty shillings. All placards were declared void. Some small variation was made in this regulation by stat. 25 Hen. VIII. c. 17. This, like the former acts, declared void all former placards.

These were followed by stat. 33 Hen. VIII. c. 6. which repealed all the former laws, and is the principal act upon this subject. The chief regulations of this act were these: the prohibited instruments here mentioned are the cross-bow, hand-gun, hagbut or demihake; and they were not to be used or kept under penalty of 10l. unless by a person having 100l. per ann. But hand-guns that were not full a yard in stock and gun, and hagbuts and demihakes not being three quarters of a yard, were forbid to all persons under pain of 10l.; and persons having 100l. per ann. might take such short instruments, or any cross-bows, from persons who had them. This act contains a number of provisions too long to enumerate. Among others one was, that all placards should in future be void. Lords and gentlemen, and inhabitants of cities and towns, might shoot at butts or banks with hand-guns of a proper length.

Thus far provision was made for prohibiting the new-invented weapons. Meantime, the legislature did not neglect to make regulations for encouraging the exercise

of the long-bow. As the former course of acts had an eye to the unlawful destruction of the game, the latter kept in view the many unlawful games in which the people indulged themselves in preference to that of shooting in the long-bow: so that as the former were a species of game-laws, the latter were acts against gaming. The first of these acts was stat. 3 Hen. VIII. c. 3. which act was made perpetual, and the policy of it pursued by stat. 6 Hen. VIII. c. 2. but both these were repealed by stat. 33 Hen. VIII. c. 9. This act is still in force, and, as it contains more general and effective provisions than any later statute, for suppressing public gaming-houses, it is particularly worthy of notice.

This act purports to be made in consequence of the complaint and petition of the bowyers, fletchers, stringers, and arrowhead-makers; and it enacted, that every person, not being lame or decrepid, within the age of sixty (except spiritual persons, the judges and justices of assise), should use and exercise shooting in long-bows, and have a bow and arrows continually in his house for that purpose. Fathers and governors of those of tender age were to teach them to shoot; having for every male child of seven years old in his house, till he was seventeen, a bow and two shafts to induce him to learn. Where such young people were servants, their masters were to abate out of their wages the prices of such bows and arrows. After seventeen years, such young persons were to provide themselves with a bow and four arrows. If any father, or master of a family, or servant, failed herein, he was to forfeit six shillings and eightpence. These provisions are followed by several about building butts, the prices of yew, and other bows: and all breaches of these regulations were made cognisable by the justices in sessions and stewards in their leets.

These are followed by the regulations about unlawful games, which are as follow: No person by himself, or

his servant, or other person, for his gain, livery, or living, was to keep, have, hold, occupy, exercise or maintain any common house, alley, or place of bowling, coying, cloysh-cayls, half-bowl, tennis, dicing-table, or carding, or any other manner of game prohibited by any statute heretofore made, or any unlawful game hereafter to be invented; on pain of forfeiting, for every day of keeping such place or suffering such game, forty shillings; and every person using and haunting such houses and plays, and there playing, for every time six shillings and eightpence. Every placard to keep a common gaming-house contrary to this act, was to specify the game and persons to play at it, or was to be void; and persons obtaining such placard; before they put it into execution, were to find sureties not to use the placard contrary to this statute: but these placards were declared void by a subsequent statute (a). Justices, mayors, and other head-officers, are authorized to enter into houses where games are suspected to be exercised contrary to this act, and to arrest the keepers and persons there resorting, and keep them in prison till they respectively find sureties not again to offend. Such head-officers are directed to make search weekly, or, at furthest, once a month, for such houses; and if they neglected for a month, they were to forfeit forty shillings. No artificer, husbandman, apprentice, journeyman, labourer, or serving-man, was to play at tables, tennis, dice, cards, bowls, or any other unlawful game, out of Christmas, under pain of twenty shillings for every such offence. At Christmas they were only to play in the houses or in presence of their masters. None, at any time, were to play at ball in open places, out of a garden, or orchard, under pain of 6s. 8d. All leases of houses, where unlawful games were exercised, are declared void. There are two provisos to this act; one

(a) Stat. 2 and 3 Ph. and Ma. c. 9.

allowing masters to license their servants to play at cards, dice, or tables, with them, or with any other gentleman, in their master's house or presence; the other allowed any nobleman, or person, having 100*l.* per ann. to license his servants, or family, to play within the precinct of their houses, gardens, or orchards, at cards, dice, tables, bowls, or tennis. All other statutes against unlawful games were repealed, so that this act became the code of law upon this important article of Police.

The last penal law made in this reign was for the punishment of an offence which had been encouraged, if not occasioned, by the many bloody laws concerning treason which had gone before it; and may be reckoned as one very strong instance of the ill consequences attending a multiplicity of penal laws. Many evil-disposed persons availing themselves of the then state of things, when almost every public offence was treason, and every treason was infallibly punished as the law directed, had endeavoured to bring those whom they disliked under suspicions, by dropping papers conveying accusations of crimes against persons by name. To repress this abominable practice, it was by stat. 37 Hen. VIII. c. 10. ordained to be felony without clergy for any person to make, or cause to be made, a writing comprising a charge of treason, and to leave it in an open place where it might be found; unless the party so doing subscribed his name to it, and within twelve days appeared in person before the king or his council, and there affirmed the truth thereof, and did his endeavours to prove it. A provision of this kind was never more necessary than at this period; although the act did not quite discountenance this mode of information, it inflicted a proper punishment on the worst species of it. In punishing with death those who so insidiously endangered the lives of others, this act so far pursued the spirit of our old law, which adjudged to death such perjured persons,

as, by their false oaths, had effected the conviction and execution of an innocent man (a).

The remaining statutes of this reign which any way affect our criminal jurisprudence, are such as were contrived to bend and accommodate the proceedings at common law, so as to facilitate the trial, and insure the punishment of offenders; such as extended the common-law trial to cases which were before cognisable by another rule of determination; such as instituted or altered some new-invented tribunals of criminal justice; and, lastly, those that deprived many offenders of the benefit of clergy and sanctuary.

The first act that made any change in the course of criminal prosecutions, is stat. 3 Hen. VIII. c. 12. Complaint had been made, that sheriffs and other officers returned jurors for the king, who would readily perjure themselves for corrupt purposes. To remedy this, power was given to justices of gaol-delivery, and of the peace, to reform the pannel, by putting in and taking out of names: this was confined to juries that were to inquire for the king. The next was stat. 4 Hen. VIII. c. 2. which has been before mentioned as taking away clergy from certain offences. The second clause of that act was pointed against an abuse of the plea of sanctuary, when felons used to allege that they had been taken out of a privileged place in some foreign county, in order to delay the trial, which by law ought to be in such alleged county. To prevent this, it was ordained by this act; that such foreign pleas should be tried by the jury of the county that was to try the felony. This act was temporary, and having expired by the meeting of a new parliament in the 7th of the king, was revived and made perpetual by stat. 22 Hen. VIII. c. 2. Another devise to elude justice was, for murderers and felons, upon untrue suggestions, to re-

(a) Vid. ant. vol. II. 353.

move themselves and their indictments before the king's bench, which could not afterwards remit them into the county, till stat. 6 Hen. VIII. c. 6. gave the court that authority to remand both, and to command the justices of gaol-delivery, of the peace, or other, as the case might be, to proceed thereon. By stat. 23 Hen. VIII. c. 13. the challenge of a juror, in trials of murder and felony in cities and towns corporate, for want of freehold, was taken away.

After so far deviating from the old rule which governed trials, as to make an *incidental circumstance* triable in a foreign county, the parliament ventured further, and made *offences* committed in one county and place triable in another. To remedy the disorders following from the relaxed state of the judicial economy in Wales and its marches, it was enacted, as has been related, by stat. 26 Hen. VIII. c. 6. among other regulations for the reformation of judicature there, that coiners and felons within any lordship marcher of Wales should be tried in the next English county; and when these lordships were divided into counties, by stat. 34, 35 Hen. VIII. c. 26. it was declared (a), that this provision should still continue in force. In the mean time it had been enacted; by stat. 32 Hen. VIII. c. 4. that all treasons, and misprisions of treason, committed within the principality of Wales and its marches, or wheresoever the king's writ runneth not, should be tried by a commission of *oyer and terminer wheresoever* the king shall appoint.

The policy of trying treasons in *any* county that the king should please to appoint, had been first begun by stat. 26 Hen. VIII. c. 13. which enacted, that any offence *made treason by that act, or that was before held treason*, committed out of the limits of the realm, *in any outward parties*, shall be inquired of *in such*

Trial of treason committed in Wales;

and committed out of the realm.

county of the realm, and before such persons, as it should please the king to appoint by commission: and to enforce this new method of proceeding, it was also enacted, that process of outlawry against offenders in treason being resident out of the realm, or in any parts beyond the seas, at the time of the outlawry pronounced, should be as good and valid as if they were within the kingdom at the time. The provision of this act was extended by stat. 35 Hen. VIII. c. 2. to offences *heréafter to be made* or declared treason, misprision or concealment of treason; and it was added also by this last statute, that peers should, notwithstanding, be tried by their peers in this case, as well as in others; lest the novelty of this proceeding, enacted generally, should be considered as so far excluding peers from their common-law trial.

We here see the steps the legislature made in the introduction of this novelty of foreign trials. First, coining and felonies committed in Wales and the marches, were to be tried in the *next* English county, by stat. 26 Hen. VIII. Next, in the same year, it was ordained, that treasons committed *out of the realm* might be tried in *any* county. About six years afterwards, it was enacted by stat. 32 Hen. VIII. that treasons committed in *Wales* should be inquired of in *any* county: and now, in the next year we find two statutes which directed, that treasons or murders done *within* the realm, might be tried in *any* county the king should please to appoint. The next to these is stat. 33 Hen. VIII. c. 20. concerning trials of lunatics who had committed treason, of which we shall say more hereafter. After this is chap. 23. of the same statute, which ordained, that any person being examined before the king's council, or three of them, upon any treason, misprision of treason, or murder, and who confessed the same, or was violently suspected, should be tried by a commission of *oyer and terminer in such shire* as should be appointed by the king. In such trials, the

challenge of a juror for want of a freehold of forty shillings a-year was taken away; and a peremptory challenge was, for the future, to be allowed in *no case* of high-treason, or misprision. There was the like saving of the right of peers in this, as had been in the former act.

The statute for the trial of *lunatic* traitors, just alluded to, has more remarkable circumstances in it than those concerning the locality of trial; and is a cruel instance of the anxiety in the government that no offender should, by any possibility, escape punishment. It directed, that if any person was of sound memory, when examined before the king's council on a charge of high-treason; and after his examination and confession thereof, he should happen to fall to madness, or lunacy; yet, if it should appear by the testimony of four of the council, that he was at the time of examination of sound memory, a commission of *oyer and terminer* might be issued into *any such shire as the king pleased*, where the offender was to be indicted and arraigned *in his absence*, witnesses heard, verdict found, judgment passed, and the party to be executed thereon, as if the proceeding had been in his presence.

If the simplicity and moderation of our old law was violated by the many new-fangled treasons and other penalties enacted in this reign, the candour of the ancient method of trial was not less destroyed by the extravagant innovation of this statute; nor was that which we mentioned next before, very compatible with the original notion upon which the trial by jury was founded.

These last-mentioned statutes, as they took away some of the great advantages derived from the trial by jury, tended to restrain it; unlike that act which made treasons committed out of the realm capable of being tried by a jury in any county, which so far contributed to impart to a new sort of offenders the benefit of this tribunal. The same may be said of that statute which made *piracy* examinable by a jury, in a proceeding at *rates*. Trial of pi-
rates.

common law. This act was made in the following year, upon the same ideas, and with the same designs.

There were two statutes made for the trial of pirates and robbers on the sea, stat. 27 Hen. VIII. c. 4, and 28 Hen. VIII. c. 15. containing the same provisions in every respect; with this only difference, that the former allowed *three* of the commissioners to be a quorum, the latter required *four*. All piracy, theft, robbery, and murder upon the sea, were heretofore tried before the admiral, his lieutenant, or commissary, according to the course of the civil law; the nature of which is, says the preamble of the statute, "that before any judgment of death can be given against offenders, either they must plainly confess their offence (which they will never do without torture or pains), or else their offence be so plainly and directly proved by witnesses indifferent, such as say their offence committed; which could not always be got; either because they murdered those they robbed, or the parties who were present at the fact, being sea-faring people, were continually changing place." These are the reasons stated in the act for recurring to a new mode of inquiry. It was therefore ordained, that all such offences done upon the sea, or in any haven, river, or creek, where the admiral pretends to have jurisdiction, shall be inquired and determined in such county as shall be limited by the king's commission, as if the offence had been committed on land. These commissions are to be directed to the admiral, his lieutenant, deputy, and three or four such other substantial persons as shall be named by the lord chancellor, authorising them, or four of them at the least, to hear and determine such offences after the common course of the laws of the realm, in cases of treason, felony, murder, robbery, and confederacies committed upon land; with the same order, process, judgment, and execution: and persons convicted thereby are to suffer such pains of death, loss of land, goods, and chattels, as

if they had been attainted and convicted of any treason, felony, or robbery, without benefit of clergy or sanctuary. This statute gives a common-law trial in a case which was not before cognisable thereby, but only by the civil law. Piracy still remains an offence by that law, as it was before this statute; but it is now subject to forfeiture of lands and goods, like a felony. It is not made *felony*, nor has it the properties of felony. There is no corruption of blood, nor are there any accessaries before or after the fact; at least as the crime stood upon this act; though alterations to that effect have been made by later statutes (a); and it has been held, that a pardon of all felonies does not pardon piracy (b).

As the admiral had, by the common law, cognisance of crimes *on the sea*, the court of the constable and marshal (c) heard and determined all offences committed on land out of the realm: both these courts proceeded according to the civil law; and the new regulations made by these three statutes relating to piracy and treasons done out of the realm, in prescribing these new modes of trial, so far extended the jurisdiction of the common law; and have therefore been held not to be repealed by stat. 1 Ph. and Mar. which ordained, that all trials for treason should be according to the due order and course of the common law.

There was a new criminal court erected by stat. 33 Hen. VIII. c. 12. to be held before the lord great master (d), or lord steward of the king's household; and in their absence, before the treasurer, comptroller, and steward of the Marshalsea, or two of them,

Trial of blood-shed in the palace.

(a) Stat. Will. III. and Geo. II.

(b) 3 Inst. 112.

(c) Vid. ant. vol. III. 194.

(d) This great officer was a new appointment made by Henry for his favourite, Charles Brandon, duke of Suffolk. By stat. 32 Hen. VIII. c. 39. he was to have all authority that the lord steward of the household had. This act was repealed by stat. 1 Mar. stat. 3. c. 4. and the office of lord steward restored. The title in the statute of Henry VIII. is that of *lord great master of the household*, or, *grand maistre del hostel du Roy*.

whereof the steward of the Marshalsea was to be one. They were to hear and determine all treasons, misprisions of treason, murders, manslaughters, bloodsheds, and malicious strikings by reason whereof blood was shed, within any of the palaces or houses of the king, while he was personally resident there. The inquiry was to be by a jury of yeomen officers in the cheque-roll. The punishment of malicious striking and bloodshed was, that the right hand should be struck off; and, "for a declaration of the solemn and due circumstance of the execution," as the statute says, it assigns some part in this bloody rite to almost every officer in the household; which is said by the act to have been a ceremony of long time used and accustomed. It probably was so; for the ceremonial seems to outdo even all the exquisiteness of penal legislation which we have before related in this remarkable reign. The act directs, with great precision, that the serjeant-surgeon is to be present to sear the stump, when the hand is stricken off; the serjeant of the pantry, to give bread to the offender after the operation; and the serjeant of the cellar, with a pot of red wine to give him to drink; the serjeant of the ewry, with cloths; the yeoman of the chandry, with seared cloths; the master-cook, with a dressing-knife, who is to deliver it to the serjeant of the larder to hold it upright during the execution; the serjeant of the poultry, with a cock to wrap about the stump; the yeoman of the scullery, with a pan of coals to heat the searing-irons; and the serjeant ferrier, to bring the searing-irons; the groom of the stable, with vinegar and cold water; and lastly, the serjeant of the wood-yard to bring a block, with a betel, a staple, and cords to bind the hand upon the block till execution is done. This formality, which probably was designed to strike terror into the whole household, and prevent the disorders it was meant to punish, sounds more like the ordinance of some rude people in the infancy of legislation, than the provision of a wise and polished nation. This barbarous judgment, we are informed, was actually exe-

cuted on Sir Edmund Knivet, at Greenwich, for striking a man, the king then being there. This was in 33 Hen. VIII. and probably was a proceeding under this act of parliament (a). It should be remembered, that this is a different tribunal from that erected by stat. 3 Hen. VII. c. 14. (b) which is to be held before the steward, treasurer, and comptroller, for felony in conspiring the death of the king, any lord, or privy-counsellor.

Other methods of inquiry were contrived in this reign for the determination of offences against certain statutes. These were numerous and various; and yet hardly deserve notice. Among these may be reckoned the following. By stat. 21 Hen. VIII. c. 20. an alteration, which has been noticed in another place, was made in the constituent members of the star-chamber. By stat. 31 Hen. VIII. c. 8. a particular jurisdiction was framed to inquire of those who disobeyed the king's proclamations, which was again qualified by stat. 34 and 35 Hen. VIII. c. 23. The trial of this offence was to be in the star-chamber, before certain great officers of state enumerated in the first act; but by the latter it was to be before any nine privy-counsellors, two of whom were to be the chancellor, treasurer, president, privy-seal, chamberlain, admiral, or a chief-justice. By stat. 31 Hen. VIII. c. 14. the act of the six articles, some direction was given for inquiry concerning offences against that act; and this underwent some change by stat. 35 Hen. VIII. c. 5. By the former act commissions were to be awarded to the bishop of the diocese, his chancellor, commissary, and others, to inquire of those offences. Justices of the peace also, in their sessions, and stewards of leets, might, by the oaths of twelve men, inquire thereof. By the latter, no one was to be put to his trial but upon a presentment or indictment found by twelve men before special commissioners, or justices of the

(a) *Bq. Poine.* 16.(b) *Vid. ant.* 145.

peace, or of oyer and terminer; and these were to be found within one year after the offence committed.

A reign so fruitful as this in penal laws, did not want expedients for putting them in force. To answer this purpose more effectually, the common-law proceedings were varied, commissions of a new sort were framed, and new methods of examinations were devised: all this contributed to introduce much novelty and confusion. Much of this confusion and most of these novelties were removed by the great repealing statutes 1-Ed. VI. and 1 Mar. and 1 and 2 Ph. and Mar. While these innovations were multiplying, we are pleased to find some regulations respecting the ancient tribunals. It was in conformity with a former statute (a) declared, by stat. 33 Hen. VIII. c. 24. that no justice, nor other man learned in the laws of the realm, should exercise the office of justice of assise in the county where he was born, or then inhabited. By stat. 33 Hen. VIII. c. 10. the justices of the peace were required to divide themselves, two at least, into every hundred, and hold a session for such respective divisions, six weeks before the quarter-session, to inquire of vagabonds, giving of liveries and badges, maintenance, embracery, unlawful games, and other offences, and hear and determine the same. But this six weeks session was found to be too burthensome, and was repealed by stat. 37 Hen. VIII. c. 7. which directed the justices to take cognisance of all those offences at their quarter-sessions.

We now come to consider the alterations made in the law of clergy and sanctuary. The acts upon this head are such as either take those privileges from certain offenders, or such as make any regulation concerning persons who were still to be indulged with them. In order to shew the steps by which the legislature advanced in abolishing these ancient exemptions from the process of criminal justice, it will be, perhaps, the clearest method, to take

(a) Stat. 6 Ric. II. c. 2. Vid. ant. vol. III. 290.

a view of them all together, in the order in which they were passed.

The taking the benefit of clergy from certain offences had been begun in the last reign, when ^{The benefit of clergy taken away.} it was taken from the desertion of soldiers, and from petit-treason (a). It was thought proper now to pursue the same course with robbers and murderers, who, says the preamble of the statute, "*bear them bold of their clergy, and live in manner without fear or dread;*" for reformation of which it was enacted, by stat. 4 Hen. VIII. c. 2. that all persons committing murder or felony, in any church, chapel, or hallowed place; or who of malice premeditated rob or murder any person in the king's highway, or rob or murder any person in his house, the owner or dweller of the house, his wife, child, or servant, then being therein and put in fear or dread, such person shall not be admitted to his clergy. There was an exception in favour of those in holy orders. This act was only temporary, in order to try the temper of the people, as to such innovations upon the ancient superstition of the realm: it was to last only to the next parliament. The manner in which this statute was received by the clergy, will appear from a transaction which we shall relate at length: it will be thence seen with what zeal and what arguments they maintained this claim, even at the period when it was so near its final dissolution; and how far they had weight, even with this absolute monarch, to suspend, for a time, the effect of his resolution to abolish their privileges.

In the 7th Hen. VIII. while the parliament was sitting, the abbot of Winchcombe, in his sermon at Paul's Cross, declared to the people, that this act was contrary to the law of God, and the liberties of the church; and that all those who were parties to the enacting of it, had incurred the censures of holy church. In support of this declaration, he shewed them a decree which pronounced, that *tam minores*

(a) Stat. 7 Hen. VII. c. 1. stat. 12 Hen. VII. c. 7. Vid. ant. 156.

quàm majores ordines sunt sacri; and therefore, that all who had received any kind of orders, were exempt from temporal punishment *pro causis criminalibus*, before the temporal judge. This critical time for so open an attack on the legislature was probably chosen, in order to prevent a revivor of this statute, which, by the terms of its continuance, had now expired. Such conduct was noticed by the king, who, at the instance of several temporal lords, and members of the house of commons, resolved, that the point should be fully and solemnly debated before the judges, and the king's temporal council (a). There was accordingly a meeting held at Blackfriars; and there appeared several divines and canonists to argue the matter on both sides, for the king and for the clergy. Upon this argument, it was thought that those who spoke for the temporal power had the advantage, and many pressed that the bishops should be required to use their authority with the abbot, and make him recant what he had preached; but they strenuously declined it; and said, on the contrary, that they were bound by the law of holy church to maintain the abbot's opinion with all their power: and thus the matter rested for some months, without any thing decisive being concluded upon.

An incident soon happened which revived this question, and brought it once more to issue in a more solemn manner. *Doctor Horsey*, chancellor to the bishop of London, had caused one John Hunne to be taken up on a charge of heresy, and had committed him to the Lollards tower, as it was called, in St. Paul's. Soon afterwards this man was found hanging in his chamber; and a suspicion of murder fell upon the gaoler and *Doctor Horsey*. This was increased by the former taking refuge in the sanctuary at Westminster; and the world were satisfied of the justness of their suspicions, when the coroner's inquest found them both guilty of the murder. Before this verdict was given, the

(a) *Justices at temporal council del roy.* Keilw. 181.

bishops, perceiving what course the affair was likely to take, and foreseeing the consequences it might be productive of; since the late dispute at Blackfriars, thought they would make their ground more sure, by striking the first blow; and therefore they summoned *Doctor Standish* (who was the principal of those who had argued at the late meeting against the exemption from temporal jurisdiction) to appear before the convocation. Here they objected to him, that he had maintained certain opinions which were contrary to those taught by holy church. The particular articles were exhibited to him in a formal bill by the archbishop of Canterbury, and were none other than what had been the subject of controversy at Blackfriars. The Doctor, finding that they meant to make this a matter of heresy, applied to the king for protection against the persecution of the clergy, which he had excited only by his zeal for maintaining the temporal authority of the king's courts. The clergy also addressed the king; protested that they did not proceed against this man for any thing he had said at the conference in behalf of the king's power, but for doctrines advanced at certain lectures since; and adjured the king, by his coronation oath, and as he would avoid the censures of the church, to assist them in their inquiry. The temporal lords and the judges, with the commons house of parliament, in their turn addressed the king, and pressed him by the like obligation of his coronation oath, to maintain his temporal jurisdiction, and give all assistance to *Doctor Standish*, who was attacked by the malice of the clergy, for advancing what was the same in effect as he had urged in opposition to the sermon of the abbot; and that the bishops were attempting to establish all the points maintained in that famous discourse. Upon this the king consulted with *Doctor Vesey*, the dean of the chapel; and it being his opinion, that the making the clergy answer before the temporal judges, as used in this country, was very compatible with the law of God, and the liberties of the

church, Henry once more called an assembly at Blackfriars, consisting of the judges and all the council, as well those of the spirituality as temporality (a), and certain persons of the parliament. There the bill against Doctor Standish was read, and the whole matter again fully discussed. The substance of the arguments on both sides, at the former assembly and at this, was as follows :

Those who maintained the exemption of the clergy from temporal jurisdiction in criminal cases, insisted on the papal decree before-mentioned. They contended this was express, and all persons who were of the Christian religion were bound to obey it, under pain of a mortal sin ; and *therefore*, that the putting of the clergy to answer for offences before the temporal tribunal, was *peccatum in se*. They said, the privilege of clergy was established by the express command of Jesus Christ, in these words, *nolite tangere Christos meos* ; and every law of man which militated with this divine command, was damnable in itself ; and *therefore*, they again concluded, that bringing clerks before the temporal courts for crimes, was *peccatum in se*. They said, that the temporal judge could no more justify the arraiguing his *spiritual father*, than he could justify the arraiguing his *natural father*, which would be a breach of God's express commandment, "*Honour thy father*," &c. which words extend as well to the spiritual as the natural father ; and no disobedience of the son in breaking this law could be justified by usage or custom.

To this it was answered, that the stat. 4 Hen. VIII. and the arraignment of clerks before the temporal judges, were compatible with the law of God and the liberties of the holy church ; that this proceeding had in view the public good of the whole kingdom, which ought to be favoured by all laws. As to the papal decree, and that a breach of it was *peccatum in se*, God forbid, said they,

(a) *Tout le conseil del roy spiritual et temporal.* Kellw. 163.

that such a conclusion should be made; for there is another decree of equal authority, which requires all bishops to be resident at their cathedrals at every feast of the year, though we see that the greater part of them never comply with it. Besides, this decree was never received in England, and therefore cannot bind here; and the usage, both before and after the making of it, has always been to the contrary. That before the time of St. Austin, marriage was permitted to priests; but then a decree was made to forbid it: and because this decree was received in England, as well as in many other places, therefore it became the law that priests should not marry. But in some parts of the world this law was never received; as among Christians in the East, where priests had always been allowed to marry. In like manner, this decree, never having been received here, was of no binding authority. That the words *nolite tangere Christos meos* were not spoken by our Saviour, but more than a thousand years before his time by *David*; and that the “*anointed*” there spoken of were the true believers, as contra-distinguished from the unbelievers, who at that time were very numerous in Palestine. As to the interpretation put on the fifth commandment, they said, that it would be no breach of it for the son to arraign his natural or spiritual father; and if they should both be convicted, he might commit his spiritual father to the ordinary, and respite judgment against his natural father, and yet be in perfect obedience to the commandment. But admitting, for sake of argument, that the temporal judge could not justify the arraigning his spiritual father, the argument would not hold, nor prove that he might not exercise the like judicial authority over all other clerks; for every clerk is not his spiritual father. However, after all, they said, this commandment was not to be taken in the literal sense here put upon it; but was to receive a reasonable interpretation according to the subject matter.

These are stated to be the arguments used by both sides in this famous contest. Upon these the judges gave their opinion; which was, that those of the convocation who had agreed to the citing of Doctor Standish, had incurred a *præmunire*. Afterwards, the same persons met at *Baynard's Castle*, in the presence of the king; when cardinal Wolsey, in the name of all the clergy, threw himself at the king's feet, and making an humble protestation in maintenance of the clergy's claim to exemption in criminal cases, he conjured the king to suspend his decision till the matter had been determined by the Pope. The archbishop of Canterbury joined in the same prayer. The king said, that they had not answered the arguments of Doctor Standish; and The king's de- added with firmness, "By the order and suffer-
termination. "ance of God we are king of England; and the
"kings of England who have gone before us never had any
"superior but God alone; and therefore know, that we
"will maintain the right of our crown and temporal juris-
"diction, as well in this point as in others, in as ample a
"manner as our predecessors have done before us. And
"as to your decrees, we are well assured, that you your-
"selves of the spirituality act in contradiction to the words
"of many of them, as has been shewn you by some of
"our spiritual counsel on this occasion; and besides that,
"you interpret your decrees at your pleasure; therefore
"we will not conform to your will and pleasure more than
"our progenitors have."

With this peremptory declaration of the king the business concluded. The bishops promised that Doctor Standish should be discharged from the process instituted against him; and Doctor Horsey was so far rescued from temporal authority, that having remained in a kind of free custody in the house of the archbishop of Canterbury till the popular clamour was somewhat abated, he surrendered himself privately to the court of king's bench; and having pleaded not guilty to the coroner's inquisition, the

king's attorney confessed the plea, and he was discharged (a).

The clergy seem, in this instance, not to have lost any part of their wonted felicity in contending with the secular power: they appear to have gained a victory in the decision, however they might have failed in argument. It is probably to be ascribed to the zeal of the clergy displayed on this occasion, that a statute founded on good sense, and so necessary for the public security, was suffered to expire: nor was it till the king had declared hostilities against the whole papal authority, that the parliament ventured again to abridge the privilege of clergy. This was in the 23d year of his reign, when clergy was taken from murder and robbery in certain circumstances: but previous to that, two acts were made respecting abjuration and sanctuary, of which it will be necessary first to take notice.

The privilege of sanctuary underwent a like discussion with that of clergy. On the occasion of a claim of this sort, made by the prior of St. John's, the general question of sanctuary was brought before the council, in 11 Hen. VIII. The king himself was there present, and expressed a doubt, whether it could ever have been the design of our ancient kings and popes, in their grants of sanctuary, to give that privilege in cases of murder and larceny committed out of the sanctuary *sub spe redeundi*, all which he judged to be an abuse: he there signified his determination that this privilege should be reduced to the compass of its original design. It seems the abbot of Westminster, in conjunction with cardinal Wolsey, had framed an oath to be taken by all sanctuary-persons, by which they bound themselves not to commit treason or felony, either within or without the sanctuary, *sub spe redeundi*: there was however no sanction to enforce this oath, but such as could be inflicted by the spiritual court for perjury. Most places of sanctuary, therefore, became resorts for felons,

(a) Keilw. from 180. b. to 185. b.

debtors, and delinquents of all sorts, where they lived at no small expence upon the plunder of the public (a).

Abjuration and sanctuary. We shall now see what was done by the parliament towards reforming the abuses then complained of. It was endeavoured, by stat. 21 Hen. VIII. c. 2. to secure the departure out of the kingdom of all abjured persons. It enacted, that every person who had taken sanctuary for felony or murder, where he ought by law to abjure, should, after his confession, and before his abjuration, be marked, by order of the coroner, with a hot iron, on the brawn of the thumb, with the letter A, that he might be known for an abjured person. It was moreover provided, that any felon or murderer who ought to abjure, refusing to take his passage as limited by the coroner, should lose the benefit of his sanctuary, and be taken out and committed to prison, to be dealt with according to law. But the banishment of so many abjured persons began now to be thought not the wisest policy; as many able and expert artificers and labourers were thereby furnished to foreign countries. A new method of ordering these abjured persons was struck out by stat. 22 Hen. VIII. c. 14. which directed the oath of abjuration to be altered; and that, instead of abjuring the realm, as before, such an offender "should abjure from all his *liberty* of this realm, and from his *liberal* and free habitations, resorts, and passages, to and from the universal places of this realm, which appertained to the liberty of the king's subjects unfamed:" and having made this abjuration, he was to be directed by the coroner to any sanctuary within the realm, which the offender should chuse, there to remain as a *sanctuary-person abjured* during his natural life, and to be burnt in the hand, as directed by the former statute. If he came out of such sanctuary, he was to suffer death as an abjured person returning to the kingdom. Such sanctuary-person committing any petit-treason, murder, or

(a) Keilw. 189, &c.

felony (a), either in or out of sanctuary, was to lose all benefit of sanctuary. Thus was abjuration put upon a new footing; and such offenders as used to avail themselves of this privilege to escape punishment, were kept hereafter within the reach of the law.

When such provision was made for the due confinement of sanctuary-persons, a like policy was pursued in regard to those intitled to clergy; and that benefit was also taken away in many cases where it was before enjoyed. This was effected by stat. 23 Hen. VIII. c. 1. an act which partly had in view the stat. 4 Hen. VIII. c. 2. upon which we have just said so much; and partly some former statutes relating to the purgation of clerks convict. The preamble recites the statute of Westminster 1st, stat. 3 Ed. I. c. 2. which enjoined bishops not to deliver clerks indicted of felony without due purgation (b): and stat. 4 Hen. IV. c. 3 (c). which ordained, that persons convicted of treason not against the king's person, and notorious thieves delivered to the ordinary as clerks convict, should not make purgation, but be safely kept in custody, according to a constitution provincial to be made, but which never was made: since which, the statute complains, it continually happened, that persons convicted according to law, and committed to the ordinary, "were delivered for corruption and lucre;" or, "were suffered to make their purgation by such as nothing knew of their misdeeds." To remedy such abuses, it was enacted by this statute in the following manner: In the first place, clergy was taken away from certain offences; and, in the next place, some provisions were made respecting those who were still to enjoy the benefit of clergy; which provisions were calculated to render that benefit less mischievous than it had been. It was enacted, that no person found

Clergy again
taken from
certain of-
fenders.

(a) Vid. stat. 23 Hen. VIII. c. 15. the preamble of which gives some idea how sanctuary-persons lived in those privileged places.

(b) Vid. ant. vol. II. 134.

(c) Vid. ant. vol. III. 240.

guilty, after the laws of the land, of petit-treason ; for wilful murder of malice prepensed ; for robbing of any church, chapel, or other holy places ; for robbing of any persons in their dwelling-houses or dwelling-place, the owner or dweller in the same house, his wife, his children, or servants then being within, and put in fear and dread by the same ; or for robbing of any person in or near about the highways ; for wilful burning of any dwelling-houses or barns wherein any grain or corn shall happen to be ; nor their abettors, procurors, helpers, maintainers, or counsellors, shall be admitted to the benefit of their clergy, except only such as are within holy orders, that is to say, of the orders of sub-deacon (a) and above.

As to those in the orders of sub-deacon and above, when delivered to the ordinary as clerks convict of any of the above-mentioned offences, they were in no wise to be suffered to make their purgation, nor to be set at liberty ; but to remain in prison during life, except they found two sufficient sureties to be bound for their good abearing. However (b), the ordinary, if he pleased, might, by this act, degrade such clerk convict, according to the laws of the church ; and send him to the king's bench, where judgment of death might be passed on him.

By this statute, a severe blow was given to the benefit of clergy, and to the personal immunity of the clergy in general ; for though they were not involved in all the penalty of this act, and their lives were spared, when they were guilty of the above offences ; yet they were condemned in such case to perpetual imprisonment, and even to death, if the ordinary so pleased to direct. It was in aid of this act that stat. 23 Hen. VIII. c. 11. made it felony, without benefit of clergy or sanctuary, for a clerk convict to break the prison of the ordinary and escape.

(a) Vid. ant. 6.

(b) Sect. 6.

Such a reformation in the punishment of offenders as was made by stat. 23 Hen. VIII. c. 1. deserved every attention and support to render it effectual and complete. But this act, from the terms of it, extended only to such persons as were *found guilty* after the due course of the law; therefore criminals, to prevent their being so found guilty, would stand mute, or by other means prevent a verdict. Again, in cases where a robbery or burglary was committed in one county, and the thing stolen was carried into another, the offender, if found guilty in such *other* county, could not, under this act, be deprived of his clergy; because the jury could not inquire of the robbery or burglary in the first county, but only of the larceny in their own. These defects were remedied by stat. 25 Hen. VIII. c. 3. which enacts, that all persons arraigned for any offence mentioned in stat. 23 Hen. VIII. c. 1. who shall stand mute of malice or froward mind, or challenge peremptorily above the number of twenty (to which number felons had been confined by a late statute) (*a*), or will not answer directly to the indictment, shall lose their clergy, in like manner as if they had pleaded and been found guilty. And further, that persons indicted for stealing goods in any county, and found guilty, or who stand mute, challenge, or will not answer as above described, shall lose their clergy, in like manner as if found guilty where the robbery or burglary was committed.

The sixth chapter of the same statute made sodomy felony; or, as the statute expresses it, "the detestable and abominable vice of buggery committed with man-kind or beast." This crime, we have before seen, was variously punished by our old law (*b*); but now it was made a common-law felony, and those who were convicted thereof by verdict, confession, or outlawry, were to suffer

(a) 23 Hen. VIII. c. 14.

(b) Vid. ant. vol. II. 352.

certify the names of such clerks, with the causes of their conviction or attainder.

Sanctuary

taken from certain offenders.

Having gone through all the statutes that relate to clergy, we shall now return to the 26th year of this king, and take a view of the remaining acts about the privilege of sanctuary. The privilege of sanctuary was taken from all offenders in high-treason, by stat. 26 Hen. VIII. c. 13 (a). In the following year a law was made in aid of the regulation which had been lately established for the due ordering and safe custody of sanctuary-persons. It was directed by stat. 27 Hen. VIII. c. 19. that all persons privileged in any sanctuary should wear a badge, and that any person who appeared abroad, out of the sanctuary, without such badge, should immediately lose his privilege, and be committed to the common gaol. Such persons were not to appear out of their lodging before sun-rising, or after sun-setting, upon pain of imprisonment; and for the third offence they were to lose their privilege. That the inhabitants of these privileged places might not look beyond the limits of their confinement, in any case where their necessities could be supplied within, the governors of such sanctuaries were empowered to hold plea of debt under 40*l.* and of trespasses and covenants between privileged persons and other inhabitants of the sanctuary.

Notwithstanding this attempt to regulate the œconomy of sanctuaries, some few years after, it was thought more expedient to abolish certain of these privileged places; and not to allow those which remained to extend any immunity to offenders of a particular description. It was enacted by stat. 32 Hen. VIII. c. 12. generally, that all sanctuaries, except parish-churches and their churchyards, cathedral churches, hospitals, and churches collegiate, and all chapels dedicated and used as parish-churches, should be extinguished and of no effect. But *Wells* in

Somersetshire, *Westminster*, *Northampton*, *Norwich*, *York*, *Derby*, *Launceston*, and *Manchester* (a); were still to continue places of sanctuary. This act was principally occasioned by the dissolution of religious houses, many of which had privilege of sanctuary; and the scites of them would still have enjoyed the same privilege, though the society which was to have the direction and government of it no longer existed; so that great disorders would probably have ensued, if a like provision had not been made.

It was moreover enacted, that the following offenders should no longer enjoy the privilege of sanctuary in any place whatsoever; namely, those who committed wilful murder, rape, burglary, robbery in or near the highway, or in a house, putting the owner, his wife, children, servants, or any other within the same in fear of life; those who were guilty of felonious burning of houses, or barns with corn; robberies of churches, chapels, or other hallowed places, with their abettors and procurors; and all those from whom clergy was taken by any of the foregoing laws. Several new regulations were ordained by this act respecting sanctuaries. The chancellor was empowered to appoint commissioners to make perambulations, and to settle the boundaries of them. Not above twenty persons were to be admitted at one time into any sanctuary. Their names were to be called over every day; and if any made default three days together, he was to lose his privilege.

This was the last law made in this reign concerning these unhappy objects, who at this period seem to, and must, from the nature of the thing, have been very numerous, and not to be managed but with great difficulty. The institution itself, after all the care of the legislature to regulate it, was pregnant with evils, which never could be remedied but by entirely abolishing it. The best part of the

(a) And instead of *Manchester*, *Chester*, by stat. 33 Hen. VIII. c. 15.

laws we have just mentioned, was that which took away this privilege from certain offences. These somewhat abated the mischief, till this relic of superstition was quite destroyed in the reign of James I.

It may be thought, that as many of these statutes relate to a subject which is now no more, a shorter account of them would have been sufficient; but the substance of them could not well be compressed in a smaller compass; and if they deserved consideration in a history of the changes in our law, they deserved, at least, to be treated in a manner that would render them intelligible. Indeed, if the consideration of a subsequent revolution was to have weight with the historian, not only these statutes, but most of the many criminal regulations, on which we have just been spending so much time, might be consigned to oblivion. For the sweeping acts of Edward VI. and queen Mary repealed all the statutes taking away clergy, all those for trying treason in a way differing from the course of the common law, and all those creating treasons and felonies; and when these were abrogated, what remained to posterity of the penal laws of Henry VIII.?

CHAP. XXX.

HENRY VIII.

Leases for Years and at Will—Leases by Tenant for Life, &c.—Of Fines—Manner of suffering Recoveries—Uses—A Use in Tail—Operation of the Statute of Uses—Covenants to raise a Use—A Lease and Release—Construction of Wills—The Court of Chancery—Court of Requests—President and Council of the North—Action of Covenants—Of Assumpsit against Executors—Of Trover—Debt and Account—The Criminal Law—Of Trials in two Counties—The Ecclesiastical Court—King and Government—Bills of Attainder—Torture—Of the Statutes—Of the Year-Books—Fitzherbert—Saint Germain—Rastell—Printing of Law Books—The Register—Miscellaneous Facts.

THOUGH our courts, during this reign, furnished decisions upon almost every question in the law, we shall only select such of them as relate to the new points then mostly agitated; the alterations made by parliament having taken up too great a space to allow us to enlarge much on this part of our History.

Many questions concerning leases of various kinds were agitated in this reign, and some were adjudged upon such sufficient grounds, as to stand the test of future examination without being shaken. Of those which were only agitated, but not decided upon, was a doubt upon a very common method of letting lands, whether it should be construed a lease for years, or at will: this led to much in-

quiry into the nature of a lease at will, and how it differed from a term for years.

Leases for
years and at
will.

In the third year of the king a lease came into question, where one had let to another to hold *at his own will*; but it having been long laid down (a), that a lease at will must be at the will of both parties, it was held by three justices in the common-pleas, that this should be construed to be at the will both of the lessor and lessee; for if it was at the will of the lessee, he might keep it, perhaps, for his life, contrary to the rule of law, which says no freehold shall pass without livery (b).

But the occasion when the properties of this sort of lease were thoroughly discussed was in *Potkyn's case*, in 14 Hen. VIII. A lease had been made to him in the 10th year of Henry VII. for term of a year to commence at Michaelmas, and continue till the end of *the said year, and so to the next year, de anno in annum*, as long as the parties pleased. These were the terms of the lease. Potkyns held the land for twenty-four years; at the end of that time the lessor determined the lease, and brought an action of waste: upon which it was moved in arrest of judgment, that it was only a holding at will, and therefore the defendant was not liable to waste under the statute. The objection was thus pointed: that the lease being only for a year, and beyond that from year to year, as long as the parties pleased, the first was a lease for a year, but the remainder was only at will; for, said they, every lease for years should have a certain determination, otherwise it is not a lease for a *term* of years: and here there is no certain determination, for it is at will; therefore they concluded the first to be a good lease for a year, and the remainder to be only at will. This point was frequently argued at the bar, and when it came for the court to give judgment, there was as great a difference of opinion among

(a) Vid. ant. vol. III. 336. (b) 3 Hen. VIII. *Kellway* 162.

the judges; for *Fitzherbert* and *Brooke* held it to be clearly a lease at will after the first year; but *Pollard* and *Brudenell* the chief justice held it to be still a lease for a year. As this was a matter of some importance, being that upon which it was to depend whether there should be any longer such a description of estates as those at will, it may be curious to hear what was said on both sides.

It was said by *Fitzherbert*, who thought it was an estate at will after the first year (for there was no doubt about the first year), that if it was not a lease for years at the commencement, it could not be made so by occupation. And in answer to what had been urged by the counsel, he said, it was a conceit to contend, that if the party held from year to year at the will of both, the will was only to be exercised at the commencement of every year: the will certainly extended to every part of the year; so that they might determine it at any part thereof. Again, when the counsel had said, that the word *will* was void, he said it was not so: but that operated as a sort of condition; for if I let land for a year *at my will*, the lessee would assuredly have it only at my will. Thus if I let for years, at my will, (but leave *will* out) as a lease for a year, and so from year to year, without limiting the years; this, for want of a certain determination, could not be a lease for years; therefore it must follow, that it was a lease at will. Again, if a lease was made for years generally, without any certain limitation of years, then, in the opinion of some, he would have it only two years; for two years would satisfy the plural noun in the lease: but if it was for twenty years *at will*, this would be determinable at will by either party. The stat. Westm. 2. expressly requires that the lessee should have such an estate as the lessor could not determine; if a lease, therefore, for years was made to commence at such a feast, this would not be good, because it wanted the other limitation, when it was to end. The conceit of here being several leases for a year was reprobated equally

by *Brooke*. He said, that a lease for years should be perfect by the first wording of it, or it was not a lease for years; and this, he said, was an entire lease and not several, and the whole commenced at once, notwithstanding this pretended separation from year to year. Thus, if land was let from Michaelmas next, reserving rent till the Michaelmas following, and so the next year, and the third, this was a good lease for three years, because the beginning and determination of it was sufficiently certain, without waiting for any after-circumstances to explain it.

The estates known in the law were fee-simple, fee-tail, for term of life, for term of years, and at will; and each was created by special words peculiar to itself: waste lay against tenant for life and for years by the statute; but tenant at will was at the common law. If a lease was made to a man till he was promoted to a benefice, and he had livery, he had an estate for term of life: so of a lease to baron and feme during the coverture; because these depended on a condition that had a human determination. Not so of other conditions; for a lease so long as such a tree grew, is but at will; because, said *Brooke*, it is not natural for an estate to depend on such a condition. He thought that all estates for years should be certain in their determination, and not at the will of any one, for that would be a contrariety; for which reason he could not agree with those who said, that *a lease for ten years at will*, should be determined at will; for the words *at will* were inconsistent and contrary, and therefore were void. He admitted an estate for years might be determinable at will, on a condition, but not otherwise; as on condition *if such a one is not satisfied, or declare his dissent, then it shall cease*. This is a good condition, although only at the will of a stranger. He admitted that to be certain in its determination, which could be made so by construction of the words creating it. That a lease for years, he agreed, might be construed good for *two years*, because that satisfied the plural term,

and was the greatest certainty that could be obtained out of the words. A lease for a thousand days was good, because it was as certain to count by days as by years. If one leased for a-year, and shewed the commencement of the term, and so the second, third, and fourth year, this would be good for four years, because it was sufficiently certain when it commenced, and when it was to determine; but if it was *from year to year*, there was no certainty at all. Thus a lease for years, so long as *I. S.* lived, if no livery was made, would be only at will, because by the first words of its creation there was an uncertainty of determination; so there was no certainty in the first words of creation, when a lease was *from year to year*; but if it was for *one year, and so for the next year, and so from year to year*, it would be good for the first and second year; but for the others, for want of certainty, it would be only at will. He said, he saw no difference between the above lease after the first two years, and one *for as many years as we can agree*; which, for want of certainty, would clearly be a lease only at will. Such were the reasons given by the two judges who thought this a lease at will.

On the other side, it was argued by *Pollard*, that considering how many leases were made in this way, it would be more reasonable to support it as a lease for years; and he thought it a very good lease for years. He said, that although a lease *for years, and so from year to year*, would be at will, because it was not determinable upon any certainty; yet, if a lease was made *for a year, and so from year to year, as long as the parties agreed*, the word *so* implied that the lessee should have the subsequent years in the same manner as he had the first; and it would be a good lease for ten or twenty years, if the parties so long agreed. The same as if the king granted a ward and marriage, and *so from ward to ward durante minore etate*; in which case, if the ward died within age, and the next heir was likewise within

age, the patentee would have that ward also, in the same manner he had the first. And as it was agreed by the other side, that a lease for *a year, and so for the next*, was good for the next by reference, why should it not also be good, if *from year to year*? He said, that if a lease was made for ten years at will, the words *at will* would be void; the same as in a feoffment in fee, an *habendum* for years would be void. As to the certain determination, he thought it ought to be determinable on a certainty, or on what, though not a certainty at first, might become certain; for a lease determinable on condition was not entirely certain in its determination. He said, that in case of a lease from year to year at the will of the parties, when the lessee entered into any one of the years, neither the lessor nor the lessee could determine his will for that year; and if they went on so for ten years, it would be an entire lease, and not, as some said, a several lease every year.

In all this the chief-justice *Brudnell* agreed with *Pollard*. He added, that a lease for years determinable on an uncertain event, was no uncommon thing. Thus a lease for years by an infant might be determined when he came of age; a lease by a tenant for life was determinable by his death; a lease with proviso that when the lessor had a mind to occupy the land, then the lease should cease, was held good, though determinable at will. He said a lease for three years, and so from three years to three years, was a common way of letting parsonages, and these were esteemed good leases. Again, a lease till the lessee had levied 10*l.* of the rents and profits, was a good lease; and yet there was no certainty when it should determine: the same in this case, when the will was determined, then that certainty of determination had taken place, which was marked by the terms of the original creation.

Such were the arguments used on both sides of this famous question, which after all was not determined, though they all agreed in giving judgment against the plaintiff.

For notwithstanding the lease was at an end, as stated in the declaration, it was stated in the writ, *quem TENET ad terminum*, instead of *tenuit*; which variance was held fatal; and the principal question was left in its former state, with the addition of all the topics which this solemn discussion had furnished on both sides (a). In 28 Hen. VIII. a case similar to one that had been mentioned by the chief-justice, is to be found in *Dyer*. A parson leased his rectory for the term of three years, and after the end of the three years, for another term of three years then immediately next and ensuing; and after the end of that three years, to the end of another three years, during all the term of the natural life of the lessor: and it was held, by the opinion of most of the benchers of the Middle Temple, and several justices of the common-pleas, that the termor should have only an estate for nine years, if the lessor so long lived, for it wanted words to make an estate for the life of the lessor; but if it had been, *and, so from three years to three years*, during the life of the lessor, this perhaps would have done: and it was said, that for the lessee to have a lease for the life of the rector, he should have livery of seisin (b).

Other cases upon leases happened in this reign, which, though of less importance than the above, are more worth mention, because they were determined upon and became guides in future times. These not being upon any particular head of inquiry, can be given only in a miscellaneous way. In 28 Hen. VIII. we find a case came before the court, of a lease for term of years, with a reservation of all woods and underwoods; and it was a question, whether an action of waste would lie against the lessee for cutting trees. It seemed to *Baldwin* and *Shelley* that it would not; for the wood being excepted, made no part of the land demised, and the statute forbids waste

(a) 14 Hen. VIII. 10. b.

(b) 28 Hen. VIII. 8. *Dyer*, 24. 151.

in terris, boscis, seu gardinis sibi DIMISSIS. However, they thought there might be a remedy by trespass (a).

The nature of the possession of lessee for years was agitated in a case where the lessor made a feoffment while the termor was on the land, and in occupation of it: it was doubted whether the feoffee obtained thereby the freehold and rent. *Shelley* thought the feoffment was good, because the termor and the lessor having distinct interests, the one a chattel, and the other a freehold, the freehold might well pass from the one without infringing the right of the other; though it would be otherwise, if the new estate had been a lease for years. But, on the other hand, *Baldwin* and *Fitzherbert* were of opinion, that nothing passed by the feoffment, unless the termor agreed to it; for the lessor had no right in the possession during the term; and the livery and seisin being nothing but a transfer of the possession, it could not be made without injury to the termor: they held, therefore, that the common course should be adhered to, namely, for the lessor to grant the reversion, and the termor to attorn. *Baldwin* added, that if the feoffment was made with the concurrence of the termor, the term and the rent would be gone, for this would be a complete surrender: but *Fitzherbert* denied this, for the termor's interest could not be surrendered without his assent; and he quoted several cases where it had been held, that the termor's consent to a livery made by the lessor was consistent with the continuance of his term. However, after this canvass, the point went off without a decision (b).

A lease was not uncommonly made with a condition by which the lessee was bound not to alien to a particular person. It happened that a lessee being so bound, aliened to one who aliened to the person prohibited by the lease: it became a question, whether this was a breach of the

(a) 28 Hen. VIII. Dyer, 19. 110.

(b) 28 Hen. VIII. Dyer, 33. 13.

condition: it seems to have been the opinion of *Dyer* that it was not, because every condition should be taken strictly (a). He likened it to a feoffment on condition that the feoffee should not infeoff *I. S.* and the heir infeoff *I. S.* which was no breach of the condition. Another case of this sort happened in the court of augmentations. A lease had been made for years, on condition, that if the lessee during his life assigned his term to another without assent of the lessor, the lessor might enter. The lessee devised the term without his assent; and it was argued that this was a breach of the condition. It seemed to *Brooke*, and *Hales*, master of the rolls, that this was a forfeiture, for the devisee shall be said to be in of the assignment made in the life-time of the lessee; and they took a difference between an assignment made by the law, and by the lessee himself; for they considered it as a clear case, that had the term been taken by an execution, there would have been no forfeiture. But this, like the former case, went off without a decision (b).

A lease for years was made of land with a stock of sheep upon it, and a rent was reserved. All the sheep died, and it was doubted whether the rent should be apportioned. The ground upon which those rested, who thought it should be apportioned, was, that it was the act of God, without any default in the lessee. But it was said, that the law was otherwise; for if the sea overflowed the land, or it was burnt with wild-fire, the rent would not be apportioned, but the whole rent should issue out of the remainder; though where part was evicted by an elder title, the rent should be apportioned. And of this opinion were *Bromley*, *Portman*, *Hales*, serjeants; *Locke*, justice; *Brooke*, and others of the Temple; but *Marvyn*, *Browne*, justices, *Townshend*, *Griffith*, and *Foster*, were of a contrary opinion: though all thought it consistent with reason

(a) 31 Hen. VIII. *Dyer*, 45. 1.(b) 32 Hen. VIII. *Dyer*, 45. 3.

and equity that the rent should be apportioned. This case was afterwards made the subject of a *reading* in one of the inns of court, as was very common in those days; and there it was the opinion of *More* the reader, together with *Brooke, Hadley, Fortescue, and Browne*, justices, that the rent should be apportioned (a).

No little debate, nor small difference of opinion, arose upon the effect of leases made by tenants for life and other tenants, who though possessed of a greater estate than for their own lives, yet could not make leases that extended beyond that period, without infringing the claims and titles of those who followed them; all which shewed the need there was for the parliament to take up the subject, and make some specific declaration thereon, as was actually done in this reign (b).

Leases by tenant for life, &c.

We find it laid down by *Fitzjames*, chief-justice of the king's bench, in 24th year of the king, with the concurrence of many others, that if a tenant for life leased land for years, and died, the lease became void, and the rent determined: the same of a parson's lease; and though his successor received the rent, the lease was not good against him; for being void by the death of the lessor, it could not be perfected by any acceptance or ratification (c). In a subsequent case, we find a difference made between a lease for years and for life; for after recognising the foregoing opinion, it was said, that if a parson made a lease for life, and died, and his successor accepted fealty, he should be bound by it during his life (d). In the case of a lease for years, made by the bishop of London, reserving rent to him and his successors, it was argued, whether it was void by the bishop's death; and it was held by many that it was: though it was agreed, says *Dyer*, that an abbot, bishop, or those who have an

(a) 35 Hen: VIII. *Dyer*, 56. 15.
VIII. *New Cases*, 152.

(b) *Vid. ant.*

(c) 24 Hen.

(d) 39 Hen: VIII. *New Cases*, 151.

estate of inheritance, as tenants in tail, might make a lease for years rendering rent; and it would not be void by their death, but voidable only at the pleasure of their successor, or the issue; for if they accepted the rent, the lease would be good. But they adhered to the former opinion, that in the case of a parson, or tenant for life, such lease would be absolutely void (a): and so it was again held, in the case of a parson's lease, in 38 Hen. VIII (b).

With regard to leases by tenant in tail, it was held by the justices of both benches, where *cestui que use* in tail and his feoffees made a lease for years, and died, and the issue aliened the land by fine, before he had made any entry upon the termor, or received any rent, and the alienee accepted the rent; they held, that the alienee could not have avoided the lease, even if he had not accepted the rent (c); and that it could not be avoided without entry by the issue.

A method had been contrived, by which tenant in tail could make a lease for years that would be good against the issue. The tenant in tail and the intended lessee would acknowledge the land to be the right of *A.* a stranger; and then *A.* would, by the same fine, grant and render to the lessee for years, with remainder to the lessor and his heirs (d). This device is mentioned in a case in 36th of the king, which was four years after the *enabling act*, and the statute which made a *fine* a bar to the issue. As, therefore, before the one of those acts, a lease let in this way would not bind the issue; and after the other, the tenant was by law enabled to let under certain terms; so this contrivance seems to be necessary, since those acts, in cases where it was intended to grant a lease of longer date than twenty-one years, or three lives; or not within the other terms of the enabling act.

(a) 32 Hen. VIII. Dyer, 46. 9. (b) New Cases, 154. (c) 33 Hen. VIII. Dyer, 51. 17. (d) 36 Hen. VIII. New Cases, 142.

It was mostly in conjunction with the present fashionable conveyances, that topics of real property were agitated in the courts; a fine, a recovery, a deed to raise or convey uses, or a will, was usually the occasion upon which any litigation of this sort arose. To acquaint ourselves, therefore, more intimately with the learning of real property in this reign, we shall now proceed to consider the methods in which it was most commonly transferred. First, of fines and recoveries.

Some questions upon the nature of fines and recoveries were agitated in our courts, and deserve not less attention than the statutes which have already been mentioned respecting those two methods of conveying lands and hereditaments.

Of fines. In the 19th of the king, a very important question (which has already been alluded to) (a) was agitated, upon the effect of this statute of fines. A tenant in tail had levied a fine with proclamations; and the five years passed in his life-time: he died, and it was made a question, whether his issue should be barred? This was argued at Serjeant's-inn before all the justices, who were divided in opinion. *Englefield, Shelley, and Coningesby*, thought that the issue should not be barred; for they said, that by stat. 4 Hen. VII. c. 24. a fine was to conclude both privies and strangers, with certain savings; namely, to all persons and their heirs (other than the parties to the fine), their right and interest which they had at the day the fine was engrossed, so that they brought their action, or made their entry, within five years after the ingrossing; saving also, to all other persons, such right, title, and interest, as would first grow, remain, descend, or come to them after the fine engrossed, or proclamation made, by force of any entail, or other cause or matter done before the levying of the fine. They contended, by this last

(a) Vid. ant. 239.

saving the issue in tail were aided; for they are the first to whom a right would descend after the engrossing of the fine: and though the father was privy to the fine, yet the issue is neither party nor jury; for he claims by the donor, and not by the donee, notwithstanding he must convey himself to the land by the father. For, they said, it was not like where a father disseised a grandfather of his land in fee, and levied a fine: then the grandfather dies, and afterwards the father; in which case the fine would bar the son, because he could not convey the fee-simple to himself but through the father, who was party to the fine, and therefore as heir to him he was privy to the fine.

The justices on the other side were *Fitzjames, Brudnell, Fitzherbert, Brooke, and More*. They said, that the intent of the makers of the statute, as appears by the words of it, was, that a fine should be at an end, and should conclude as well privies as strangers; and if no exception had been made in the above words, all persons, as well the issue in tail as others, would be concluded. As to the exceptions, they said, in the first there was no aid given but to femes covert; in the second, all strangers are aided who had title to the land at the time of the fine levied, if they brought their action, or made their entry within five years; but the issue are not aided by either of these two exceptions. The third saving is in favour of all other persons, which must be intended all strangers to the fine, and not privies; and by virtue of that saving, all strangers to a fine, to whom a remainder in tail, or a discent in tail, shall first accrue after the ingrossment, shall be aided. Thus if tenant in tail discontinued, and the discontinuance levied a fine with proclamations, and the five years passed, and then the tenant in tail died, the issue might have another five years, by virtue of that saving in the act. The intention of the makers was not that he who claimed by the same title as his ancestor who levied

the fine, should be aided; for such issue in tail is privy to his ancestor by whom he is to make his descent, and all privies are clearly concluded by such a fine: they therefore were of opinion, that the issue in tail were barred by such fine. All the justices agreed, that if a stranger to a fine, to whom a remainder in tail or other title first accrued after the fine, did not make his claim within five years, his issue would be barred for ever (a). This, no doubt, became the governing opinion on the stat. 4 Hen. VII. till, to remove all difference of sentiment, it was so. declared by stat. 32 Hen. VIII. as has been before shewn.

There is nothing further in the books of importance on the subject of fines, till the 27th year of the king; when we find a case, where a fine had been levied *sur grant et rendre*; in which the conusee granted to the conusor the lands in tail, on condition that he and his heirs carried the standard of the conusee, when he went to battle; and if he or his heirs failed therein, then the land should remain to a stranger. Upon its being put to the court, whether this was a good remainder, *Fitzherbert* said, he had never before seen a fine levied upon condition; and though he thought such a fine clearly good when levied, he doubted whether the justices would be willing to take such, because it was a very old language in the law-books, that *fnis finem litibus imponit*; which seemed to him not much promoted by such conditions. As to the remainder, he thought it good; and that the stranger took it before the condition broken: and when it was objected that the remainder, as it depended on a condition, could not take effect till the condition was broken, he maintained what he had first said; but had it been a feoffment, he said, that if the remainder did not take effect at the time *livery* was made, it could not afterwards. However, no judgment was given (b).

(a) 19 Hen. VIII. Dyer, 2. 1.

(b) 27 Hen. VIII. 24.

It was a common practice to make a lease for term of years by fine. The course was, first for the lessee to acknowledge the land to belong to the lessor, *come ceo, &c.* and then for the lessor to grant and render it to the lessee (a). The fine *sur grant et rendre* was a useful assurance in these and many other cases. Where it was covenanted, that *A.* should make to *B.* his wife, daughter of *J. K.* a jointure by fine, it was contrived, on account of the infancy of *B.* that the writ of covenant should be made between *J.* and *A.* by which *A.* acknowledged the land to be the right of *J. come ceo que, &c.* and *J.* granted and rendered it to *A.* for life, without impeachment of waste, with remainder to *B.* his wife, for life, remainder to *A.* and his heirs (b). What effect a fine had on an estate *in use*, will be mentioned in another place.

The modern method of ordering a recovery, so as to make it a complete bar to all secret entails, and to those claiming in remainder, was not generally practised in this reign. They often contented themselves with a single voucher; and they brought the writ against the tenant whose estate was to be barred; both which were the precise circumstances in *Taltarum's* case: and though that decision seemed a sufficient warning, they continued more commonly to suffer a recovery in that way, than in any other. In the twenty-third of the king, we find a writ of entry brought against the husband and wife of land, where the wife was tenant in tail, and they vouched over: this was held a bar to the issue in tail (c). Yet it was said, on another occasion, that if the husband survived the wife, then as the recompence would go to the survivor, this should not bar the issue (d). It was held, that where the writ was brought against the tenant for life, in order to bind the fee-simple, he ought to pray in aid of him in re-

Manner of
suffering re-
coveries.

(a) New Cases, 142. (b) 30 Hen. VIII. New Cases, 139. (c) 23 Hen. VIII. New Cases, 230. (d) 25 Hen. VIII. New Cases, 251.

version, and they were then to vouch together (a). It was held in 25 Hen. VIII. (which was before the statute for declaring void recoveries suffered by tenant for life), that if a tenant for life vouched a stranger, and the demandant recovered, and the tenant over in value, that the land recovered in value would not go to the reversioner after the death of the tenant for life; so that, in all reason, such recovery ought not to be a bar to the person in reversion (b).

In another case, about five years after, it was said, that where there was tenant for life, and he was impleaded, and vouched him in remainder in tail, or for life, who vouched over one who had title of formedon, and so the recovery was had; there the issue of him who had title of formedon, might bring his formedon, and recover against the tenant for life; for the supposed recompence should not go to the tenant for life, because the ancestor warranted only the remainder (says the report), and not the estate for term of life; and therefore, the tenant for life, who was not warranted by the ancestor, could not bind him by the recovery. In such case, it was recommended, that the tenant for life should pray in aid of him in remainder, and they should join and vouch him who had title of formedon; and if the recovery was passed in that manner, the recompence would go to both (c).

Where there was a tenant for life with remainder over, or tenant in tail, the remainder over, and he was impleaded, and vouched over a stranger, and the recovery was had in that manner; it was held by *Montague*, justice, and others, that this would bind the entail, for the recompence would go to him in remainder. It is remarked upon this case, by *Brooke*, that the law was determined to be otherwise; by all the justices, in the case of *Lord Zouch* and *Stowell* in chancery, and he thought the reason was this: That when he vouched a stranger, the

(a) 25 Hen. VIII, New Cases, 351. (b) *Ibid.* (c) 30 Hen. VIII, New Cases, 252.

recompence should not go to him in remainder ; though it would be otherwise, if he vouched the donor or his heir (a).

Notwithstanding these discordant opinions about the manner of ordering a recovery, it is evident, that some recoveries were suffered in the precise way we now see them ; for so early as the twenty-third of this king it was laid down, that a recovery with single voucher only gave the estate which the tenant in tail had at the time of the recovery ; so that if he was in of another estate, then the entail would not be bound against the heir : it was therefore recommended to suffer the recovery with *double voucher* (b). The way to effect this was, for the tenant in tail to discontinue his estate, by making a freehold to somebody against whom the *præcipe* might be brought ; that person being tenant of the land, and also to the writ of *præcipe* would vouch the tenant in tail, who would vouch over some stranger, called the *common vouchee*, and so lose the land. Here, as the tenant in tail vouched *generally*, and the stranger entered with the warranty *generally*, the recompence would be held to ensue the general warranty ; in consequence of which the tenant in tail, and all persons claiming through him, under whatever estate, would be barred ; it being in the power of none to say, the warranty was annexed to some other estate, and not to that which he claimed. Thus was a recovery settled upon the principle of *Taltarum's* case, as a complete bar to all estates that the tenant could claim.

The following question arose upon a recovery. A writ of entry was brought against a tenant in tail ; there was a voucher and recovery in value against the common vouchee ; but before execution sued, the tenant in tail died, and the issue entered : it was submitted to the court, whether the recoveror might not enter ; and it seemed to *Fitzherbert* and *Baldwin* that he might well enter ; for the issue, on

(a) 27 Hen. VIII. New Cases, 252. (b) 23 Hen. VIII. New Cases, 270.

account of the recovery over in value, could not falsify the recovery, as he might if there had been no recovery over in value. But *Shelley* thought the issue were remitted by the death of the tenant. After the delivery of these two opinions, the matter went off without a decision (a); and so the question remained, till it was solemnly settled in the reign of queen Elizabeth. Another question of difficulty respecting a recovery, and also a fine, was put to the court of common-pleas, but received no decision. It was asked, if a tenant in tail, the reversion in the king, levied a fine or suffered a recovery, the heir would be barred. The court seemed to think that the heir would be barred, though it was no discontinuance of the entail, nor had any effect as against the king in reversion. *Englefield* said, he had before met with such a case, and, upon good advice, it had been thought a bar (by which it may be supposed he meant a bar to the king, for the report had before said that they had *all* agreed upon its being a bar to the issue); but *Shelley* expressed a doubt of it. Whether it was one or the other, we have already seen, that this difficulty was removed about three years after by statute (b).

Uses. The law and doctrine of uses constituted one of the principal subjects of discussion during the whole of this reign; and so unsettled were men's minds upon the nature and qualities of this new sort of property, that questions of this kind were agitated with great difference of opinion. To convey to the reader an idea of this controversy about uses, it may perhaps be the best way to state the cases that appear on this head in our books, in the order in which they happened; as this will more readily exhibit the progress of opinions.

A case happened, in the 14th year of the king, where it was necessary to enter fully into the nature of uses. The

(a) 39 Hen. VIII. Dyer 35, 38.
Vid. ant. 239.

(b) 38 and 39 Hen. VIII. Dyer 38.

feoffees had granted a rent to a person who was apprised of the use, and afterwards made a feoffment thereof, and the *cestui que use* released all his right to the feoffee; the grantee distrained for the rent, and it became a question, whether the rent should be considered as to the use of the *cestui que use*, as the land was, or to the use of the grantee. It was maintained by *Pollard, Brooke, and Fitzherbert*, justices, that the rent should be to the use of *cestui que use*, and then the release of the *cestui que use* to the feoffee extinguished it by stat. 1 Rich. III. which allows the release of *cestui que use* to be good against him, his heirs, his feoffees and their heirs: they held likewise, where a feoffment to a use was made, that the heir of the feoffee, and his feoffee, and all persons who were in in the *per*, without consideration (or upon consideration, if they had notice of the first use), should be seised to the same use; but otherwise of those who came in in the *post*. For it was said by *Newdigate*, serjeant, if feoffees to a *use* die without heirs, and the lord enters by escheats, he should be seised to his own use. Again, if the heir of the feoffee was within age, he should be in ward to the lord, and the lord have the profits, and the feoffee's wife her dower to her own use; hers being an estate given her by law, though she is said to be in by her baron. The husband of a woman seised to a use should likewise be tenant by the curtesy, and be considered as in in the *post*, to his own use. Again, if the feoffee to a use was bound in a statute-merchant, the land was liable to be taken in execution. The feoffees might grant offices, as that of a steward, bailiff, receiver, and the like.

But *Fitzherbert* said, that if a man made a feoffment without consideration, the feoffee should be seised to the use of the feoffor, or to the same use to which the feoffor was seised; and if a feoffee was seised of a seignory to a use, and land escheated, he should have the escheat to the same use as the seignory. Again, if the feoffee of a seignory recovered in value upon a voucher, it was to the first use. To

this *Pollard* agreed, and *Brooke* admitting that the wife of the feoffee should be endowed to her own, if she took her dower at common law, thought it would be otherwise, if it was dower *ex assensu patris*, or *ad ostium ecclesiæ*; for in such cases she would be in by the feoffee; but the other was in by the law, as well as *per le baron*, and indeed without any act of her own. If a feoffee made a gift in tail, without specifying any use, he thought the donee should be seised to his own use; for here was a consideration, namely, a tenure between them, unless a use was specially expressed at the time of the gift: so in a devise by will, the use would be to the devisee, unless otherwise expressed, because there was a consideration implied: so a feoffment to a corporation or abbey would be to their own use, unless otherwise expressed. There seemed to be no doubt of what was laid down about considerations and notice; but they all agreed in it very fully, namely, that a feoffment by feoffees to a use without consideration, was to the first use, if upon consideration; if to one who had no notice of the use, the use was changed, and, of course, if with notice and consideration, the first use remained. *Brudnell*, the chief justice, carried the rule about feoffments by feoffees still further; for he said, should the feoffees make a lease for life, with remainder for life, remainder in fee, to persons who had notice of the use, they should be seised to the first use, notwithstanding the division of estates. All this was agreed in by the judges, as to the nature of uses, and the estate and power of feoffees to a use; but upon the main question they differed, all of them but *Brudnell* holding the rent void, because a man could not have a use and a rent out of the same land (a).

When a feoffment was made to uses that were declared by deed, this, like other grants, was not to be revoked; and any charge upon or disposal of the land contrary to the tenor of such uses already declared, were utterly void. However, as a will differed so diametrically from a deed,

(a) Hen. VIII. 4.

that every later was a legal abrogation of the former, so uses declared by will might be revoked and changed as often as the testator pleased. It happened that a person made a feoffment to the use of his will, and added *prout in hoc scriptis*, namely, to the use of *B.* for life, and so on; afterwards he made a lease for years, and died; and it being a question whether this lease was good, it was held by the court, that, notwithstanding the words *prout in hoc scripto*, this was clearly a feoffment to the use of the last will, which might be changed in part, or in the whole, and therefore the lease was a revocation *pro tanto*. They added, if a feoffment was made to the use of a schedule annexed, and that schedule was made in the form of a will, it might be altered as a will might (*a*).

The question, whether *cestui que use* in tail A use in tail. had any power to alien under stat. 1 Rich. III. was again agitated (*b*), and was argued before all the judges in Serjeant's-inn. The question was stated, whether if such a person made a lease or feoffment, or suffered a recovery, the issue and the feoffees should be bound by it after his death. The judges were divided in opinion: *Fitzjames*, *Norwiche*, *Fitzherbert*, *Lister*, chief baron, and *Port*, held that it would not bind the feoffees; because the statute makes such gifts and grants good against the grantor and his heir, claiming as heir to the grantor; but claiming as *heir of the body*, they said, was different from claiming as *heir*. For if feoffees were seised to the use of *B.* for life, remainder to the use of *C.* and his heirs, and *C.* was heir-apparent to *B.* and afterwards *B.* made a feoffment, or suffered a recovery, this would not bind the feoffees after the death of *B.*; because he claimed as purchaser, and not as heir. They said, every feoffee who claimed to a use in tail, did not claim to the use of the feoffor and his heirs, as the statute of Rich. III. expressly required, but to the use of

(*a*) 19 Hen. VIII. 11.

(*b*) Vid. ant. 160.

the issue in tail; and they vouched an authority in the last reign (a), which declared that the feoffment of *cestui que use* in tail did not bind the issue after his death. In the case of a feoffment to the use of an abbot, the feoffees were seised to the use of him and his successors, and not to the use of him and his heirs, so that a feoffment by the abbot would not be good.

However, *Englefield*, *Spelman*, and *Shelley*, were of a different opinion. They said, that before the statute *de donis* every tenant in tail *post prolem suscitatam* had power to alien, in spite of the donor and his heirs; so that he had in effect a fee-simple; and all that this statute did, was to restrain the donee and his heirs from aliening. But in the case in question, there was no gift of land in tail; the land was given to the feoffees in fee-simple, and the use, though called a use in tail, was in truth no tail within the statute, and was therefore at common law, as land *post prolem suscitatam*; any alienation therefore by *cestui que use* in tail, after issue, ought to bind the feoffees. They argued, that the stat. of Rich. III. would become of no effect, if feoffees could invalidate such grants after the death of *cestui que use*. It was, however, agreed by the majority, that a grant, feoffment, lease, or release, by *cestui que use* in tail, could not bar the feoffees (b); and they thought the same of a recovery.

However people might acquiesce in the above decision, as far as it affected voluntary grants by deed, or acts *in pais*, they would not endure that a recovery, which had lately been recognised as a bar to an estate-tail in possession, should not be allowed the same force when applied to the like estate in use. This point was frequently agitated in this reign, both before and after the statute of uses, and with different success. It appeared in two shapes; either where the recovery was suffered by the tenant, or by the

(a) 4 Hen. VII. 17.

(b) 19 Hen. VIII. 13.

feoffees. The following case of this kind was after the statute.

In the twenty-ninth year of the king it was held, that if the feoffees to the use of an estate-tail, or other use, suffered a recovery upon a bargain, this should bind the feoffees and their heirs, and *cestui que use* and his heirs, where the buyer and recoveror had no notice of the first use. To this it was added by *Fitzherbert* (who had, as we have seen, concurred in disallowing a recovery by tenant in tail himself) that it should bind, though he had notice of the use; for the feoffees having the fee-simple, might by law suffer a recovery. It was at the same time held by many (among whom it cannot be supposed *Fitzherbert* was one), that if *cestui que use* in tail was vouched in a recovery, it should bind the tail in use, both as to the tenant and his heirs; which opinion was founded, as *Broke* thinks, upon the authority of stat. Rich. III. (a) and, most probably, upon the reasoning of the dissenting judges in the case beforementioned, in the nineteenth of the king. We find, in the next year, a doubt was entertained whether a recovery against *cestui que use* in tail would bind the issue; and it is said by *Hales*, justice, that true it is, by such recovery, the entry of the feoffees is taken away; but after the death of the tenant, the feoffees may have a writ of right, or writ of entry *ad terminum qui præterit* in the post, or the like writ. It was questioned, in answer to the above reasoning about the statute *de donis*, whether a use might not be within the equity of that act; and they reasoned upon the statute of Rich. III. just in the way that the judges who concurred in the decision in the nineteenth of the king had treated it (b). The same year another recovery of this kind came in question; and this recovery, as we are told, had been advised by *Fitz*; serjeant. It does not appear whether that was *Fitzherbert*,

(a) 29 Hen. VIII. New Cases, 129.

(b) 30 Hen. VIII. New Cases, 134.

who we have seen thought, when upon the bench, such recoveries void. It happened in this case, that the tenant in tail died without issue, and the brother claiming the estate in chancery, the recovery was held to be good no longer than the life of the recoveree (a). Thus stood this question at the close of the reign of Henry VIII.

Fitzherbert seems not to have been always governed by the same general principles upon this subject; for, notwithstanding a fine levied by *cestui que use* in tail stands exactly upon the same grounds with a recovery, he gave a clear and explicit opinion in the twenty-seventh year of the king, that such a fine was good. The case in which he delivered this opinion is worth mentioning for another reason: *cestui que use* to him and his wife, and the heirs of the body of the husband, bargained and sold his land for so much money, and then he and his wife levied a fine to a stranger. It was said this fine was void, for at the time of levying it, the parties had nothing either in use or in possession; for by the bargain and sale, the use was in the bargainee, and nothing was either in the husband, the wife, or the stranger, so that the fine could no way be valid. *Fitzherbert* observed upon this, that he would never buy land, unless the *cestui que use* made first a feoffment, and afterwards levied a fine (b). In the thirtieth year of the king, it was rather thought, that a fine levied by *cestui que use*, though it bound him and his heirs, should not bind him in reversion, nor the feoffees, after the death of the conusor; for under the stat. 1 Rich. III. only he and his heirs, and his feoffees, claiming to his use, were to be barred, which was not so here. This doubt, as to the issue in tail, was settled by stat. 32 Hen. VIII. c. 36. as we have before related (c).

To return from recoveries and fines suffered by *cestui que use* in tail to the nature of uses in general. In the

(a) 30 Hen. VIII. New Cases, 135. (b) 27 Hen. VIII. 20. b. (c) Vid. ant. 239.

twenty-fourth of the king, we find a case where a man had made a feoffment in fee to four persons to his own use, and the feoffees made a gift in tail without consideration to a stranger, who had no notice of the first use, *habendum* in tail to the use of *cestui que use* and his heirs. On a former occasion we met with a *dictum* declaring such estate in tail to be good; and it was now accordingly adjudged, by the concurring opinion of all the judges (a), that the tenant in tail should not be seised to the first use, but to his own. They said, that the statute *de donis* ordains, *quod voluntas donatoris in omnibus observetur*. Now no one can be seised to the use of another, but one who can execute an estate to the *cestui que use*, which tenant in tail cannot do; for if he was, the issue might have a formedon, to recover the estate according to the will of the donor. The same of an abbot, mayor, and commonalty, and other corporations, as was before said; for if an abbot executed an estate, his successor might have a writ of entry *sine assensu capituli*. The same of such as were in the *post*, as those by escheat, mortmain, perquisite of a villain, recovery, dower, tenant by the curtesy, and the like, who were always seised to their own use. They repeated what had been said on a former occasion, that there was a tenure between the donor and donee, which raised a consideration, and therefore intitled the tenant in tail to be seised to his own use. The same, they said, of a tenant for term of life and years; for where fealty was due, and a rent was reserved, there, though an use was absolutely expressed to the donor or lessor, yet those circumstances were construed to amount to such a consideration, that the donee or lessee should have the land to their own use. The same where a man sold his lands for 20*l.* by indenture, and executed an estate to his own use, this would be a void use; for the law upon the consideration of money construes the land to be in the vendee.

(a) 27 Hen. VIII. 10.

It is laid down by *Fitzherbert*, that should the feoffees to the use of an estate-tail sell the land to one who had notice of the use, the buyer should be seised to his own use, and not to the use of the estate-tail; and this, because of the consideration of money; and because the feoffees, having a fee-simple, could make a good common-law conveyance (a).

The notion of tenure being a consideration sufficient to raise a use, they carried still further. They said, that uses were at common law before the statute *quia emptores*; for, before that act, upon every feoffment there was a tenure between the feoffor and feoffee, which was such a consideration as intitled the feoffee to be seised to his own use: but after that act, every feoffee was to hold *de capitali domino fædi*; so that there was no consideration between the feoffor and feoffee without money paid, or other special matter, in consideration of which the feoffee might become intitled to be seised to his own use. For, according to the opinion of *Shelley*, when the father infeoffed the son and heir-apparent (as was common in the reign of Henry III. before stat. Marl.) (b) to defraud the lord of his ward, this feoffment was to the use of the father, who took the profits during his life. The same, in case of a feoffment made by a woman to a man to marry her; the woman took the profits after the espousals; though this might be doubted, as *Broote* thinks, because there was an express consideration. Again, it was held by *Norwiche*, if a man delivered money to *F. S.* to buy land for him, but he bought the land to his own use; yet this would be construed by law to be to the use of him who delivered the money (c).

After all this debate upon the nature of uses, and when they had been recognised both by parliament and the courts for many years, a very singular attack was

(a) *New Cases*, 136.

(b) *Vid. ant. vol. II.* 62.

(c) 24 Hen. VIII.

New Cases, 136.

made upon them by the counsel of the crown. This was, no doubt, at the instigation of Henry VIII. who had frequently expressed his disapprobation of uses; and after long complaint of the loss he suffered in wardships, and other casualties of tenure, had proposed plans for curtailing them, which had not yet succeeded. He seems, this year, to have attacked them both in Westminster-hall and in parliament. The case alluded to arose upon the will of the lord Dacres; a family which, at this time, by one accident or other, gave occasion to the discussion of several points of law. The stat. 4 Hen. VII. which was one of the statutes of pernors of profits, and secured to lords the wardship of such heirs as were seised only of the use, and not in possession, had an exception in favour of appointments by the ancestor's last will. The lord Dacres, by his will, had authorized his feoffees to pay his debts; after which he limited his estate to his son in tail, the remainder over in fee. An office was found, declaring all this, and suggesting, that the will was made by covin and collusion. This being returned into chancery, it was there litigated by the feoffees before the chancellor and all the judges of England. It was contended, in support of the inquisition, first, that a use was not at common law; secondly, that it was not testamentary; thirdly, that the present will was covinous. In support of the first position, they seemed to adduce nothing to shew that this sort of property was not at common law, but merely that there was no mention of it before the time of memory in 1 Richard I. and the following reigns. To this sort of argument the other side answered, that common law did not mean such ancient usage as the counsel for the king now called for, but only common reason; and it was reasonable enough, that one man should confide in another. In proof that the common law admitted such a confidence, they recurred to the statutes of pernors of profits, from the reign of Edward III. downward: in short,

they declared it not a point to be disputed. In support of the second position, they said, that a use should follow the nature of the land; and as it was partible, if of gavel-kind, and descended to the youngest son, if of borough English, the same as the land, it was reasonable it should not be devisable any more than other inheritances, unless by special custom. To this it was answered, that a use might pass by bargain and sale by parol; and it would be strange, if after that it should not be devisable by will; and that, at any rate, such a devise was good by stat. 1 Rich. III.; and they quoted a determination in 20th year of the king, where, after some struggle, it was so determined. The third point, which regarded covin, they seemed to found upon the stat. Marl. made against covinous feoffments of an ancestor to prevent the wardship of the heir; concluding, that every will which had the same effect, should, by the equity of that act, be pronounced covinous. The answer to this was, that the present will carried no covin in it, being merely to settle the estate, and that it was within the saving of stat. 4 Hen. VII (a).

Such were the principal grounds upon which this case was argued on both sides: what the decision was, does not appear. The aspersions which were thrown upon uses by the crown lawyers on this occasion, and the bold manner in which they controverted such established positions of the common law, as the lawful existence of uses, and their being testamentary, shewed that the crown was ripe for giving the final blow to this species of property, which was at length intended by the statute of uses passed this same year.

The statute of uses caused a great revolution in this title of the law. A use, from being an equitable estate, became now a legal one; and the right to the fruits and

(a) 27 Hen. VIII. 7. b.

profits being converted into the actual seisin of the land, no longer stood in need of the court of chancery to give it effect, but was cognizable in the courts of common law. The authority of the court of chancery over landed property was by these means much ^{Operation of the statute of uses,} abridged and diminished. This for a time had a sensible effect; but, when limitations of a new impression were brought before courts of law, certain technical scruples arose, which the judges did not think themselves at liberty to get over, and things in some measure began to fall back into their old channel. An opinion was delivered in the 36th year of this king, that though a feoffment "to a man for life, and after his decease that *I. N.* shall take the profits," be a clear use, and executed by the statute; yet if it had been, that "after his death the feoffees should receive the profits, and pay them over to *I. N.*" (a) as *I. N.* would receive nothing but through the hands of the feoffees, this would not be executed by the statute. After this it was seen, that notwithstanding the stat. 27 Hen. VIII. there must be recourse to the aid of a court of equity for the execution of certain uses, that were particularly circumstanced.

The question on the statute of uses which created most doubt, was the condition of the feoffees; what interest, what power remained in them, when, at the instant of their appointment, the statute transferred the possession out of them to the *cestui que use*. Many of the opinions which had prevailed respecting feoffees after the statute of Richard III. were argued upon after the stat. 27 Hen. VIII.; they were still considered as seised in fee of the land, notwithstanding the operation of the statute, as appears from many of the cases that have been before mentioned: so that, upon the whole, a subsisting interest seemed to be attributed to them, as a kind of guardians and trustees to the *cestui que use*; which interest, if at any

(a) 36 Hen. VIII. Bro. Feoff. at Use, 52.

time partially displaced, could be again brought into being by such an act of ownership as that of entry, or at least by action. According to this notion, the state of the feoffees after the statute of Henry VIII. continued the same as it was after the statute of Richard III. when the concurrent rights of the feoffees and of the *cestui que use* occasioned so much strife. This is another strong instance in which this statute was disappointed of its effect; and this circumstance contributed to lay a foundation for much of the curious reasoning that afterwards arose upon conveyances to uses.

If the intention of the parliament was frustrated in these instances, so was it by the manner of conveying estates which soon followed. It was evidently a principal object of the makers of that act, that land should thenceforward be transferred, as anciently, by feoffment, with livery of seisin, and by other common-law assurances; whereby the notoriety of the alienation might add stability and quiet to every man's possession and right: but it is remarkable, that this very statute, on the contrary, contributed, in the end, to bring feoffments into entire disuse, and gave rise to a secret mode of conveying land pregnant with all the inconveniencies and mischiefs before complained of. They reasoned in this manner: if he who is seised of the use becomes by force of the statute seised of the land, then to give the use, is, in effect, to give the land; and the facility and privacy with which this may be transacted, renders it a desirable way of effecting that purpose. Upon this principle, the conveyances before in practice were continued, legitimated as they now were by the operation of the statute upon them; and others were soon invented of the like nature. A conveyance to uses became, on many accounts, the commonest, and perhaps the surest mode of transferring land. These conveyances have continued in practice ever since; and to give effect to them, is now one of the principal operations of the statute.

The parliament soon saw that this would be the consequence of the statute, in one instance; for, if the statute executed every use that was raised, a person who wanted to part with his land had nothing to do but to raise a use by *bargain and sale*, as was then commonly practised, and the statute would confirm the *cestui que use* in the seisin of the land as fully as if there had been a transmutation of possession by feoffment, fine, or recovery. To prevent the mischief of this in some degree, it was enacted by stat. 27 Hen. VIII. c. 16. that no bargain and sale should enure to pass a freehold, unless the same be made by *indenture*, and be inrolled within six months in one of the courts at Westminster, or with the *custos rotulorum* of the county; after which provision, it was thought the conveyance of a use would be as notorious as the ancient common-law assurances. As to deeds to declare uses, as they were only appendages to others which made a real transfer of the possession, the allowing of them to continue as they were, it was imagined, would not have any very bad tendency.

Covenants to raise uses were still in practice, notwithstanding they had been reprobated by judicial opinions of the courts of law in the last reign (a). Uses were originally a matter of invention; and they had not been so long canvassed in our courts as to preclude every private person from persisting in such opinions as his fancy or judgment might have dictated, even in opposition to one or two declarations from the judges. With these sentiments, many still advised them as sure conveyances; and as such they were practised all through this reign, till they at length obtained a degree of legal recognition.

The general question as to the validity of a *covenant to change property*, was agitated in the great case of the *prior of St. John's*, in 27 Hen. VIII.; and it was there agreed, that if a man covenanted, that on the payment of so much money another should have his lease of the manor of Dale,

(a) Vid. ant. 163.

the other, upon payment, might enter immediately; for this bargain altered the possession the same, says the book, as if it had been a bargain for money (*a*). This was a decision which, it was thought, afforded a ground of law upon which the force of a covenant to change a use might be argued with great degree of probability.

It was probably on such foundation as this that the determination in 32 Hen. VIII. proceeded. It was there laid down, that where covenants and agreements, and not uses, were contained in indentures; as if it was covenanted, that *A.* should recover against *B.* his land in *D.* to the use of the recoveror and his heirs, *and to the uses of the covenants and agreements in the indenture*; there, if he recovered, the recovery would be to the use of the recoveror and his heirs only, and *not* to the uses of the covenants and agreements in the indentures. But, say they, if uses were specified in the indenture, and it was covenanted that *A.* should recover to the use of *A.* and his heirs, *and to the uses in the indenture*, there the recovery would go to such use, and be executed by the statute (*b*). Here is a plain declaration that a use might be conveyed by covenant. Conformably with this general resolution, we find two years afterwards an opinion of all the judges, after great deliberation, in favour of covenants to convey uses. It was determined in *Mantell's* case (who had been attainted with the *Lord Dacres*), that where he after the statute of uses had made a covenant for 100*l.* and in consideration of marriage, that he and his heirs, and all persons seised of his lands and tenements in Dale, should be seised of them to the use of his wife for term of her life, and then to the heirs of his body begotten upon her, that this would change the use; and upon this decision the land was saved from forfeiture (*c*).

Thus was a covenant *executed* become a conveyance of the use; and, by the operation of the statute upon it, it had

(a) 27 Hen. VIII. 16. b.

(b) 32 Hen. VIII. New Cases, 133.

(c) 34 Hen. VIII. Bro. Feoff. al Use, 16.

the effect of a conveyance of the freehold. In this manner was one of the difficulties in the reign of Hen. VII. as to this instrument removed; but the other still remained: for as to covenants *executory*, that is, where it was covenanted, that after the covenantor's death his son, or some other person, should have the use, there is no decision in this reign which goes farther than to shew, that the fee-simple was not in such case taken out of the covenantor; and of course, that he was only liable to an action of covenant, if he exercised the full power of a tenant in fee, and disappointed the future use (a).

When it was agreed that covenants should be permitted to raise uses, it was expedient to prescribe some rules for their government. The first object in this, as in all questions about conveying a use, was the consideration. And it was laid down by *Hales*, in 36 Hen. VIII. that a use shall not be changed by covenant on a consideration passed; as if one covenanted to be seised to the use of *T. S.* because *T. S.* is his cousin; or because *W. S.* before had given him 20l. unless it was given for the same land. But a consideration, present or future, was held to be a good consideration; as a consideration of 100l. paid at the time of the covenant, or to be paid at a future day, or to marry one's daughter, or the like (b). Covenants, and the consideration on which they might be raised, were a new branch of the learning of uses, and were much agitated in the following reigns.

Before the question of a covenant was settled A lease and in this way, and while men were indulging themselves in every contrivance to maintain these secret methods of conveying their estates, the conveyance by *lease and release* was devised by *serjeant Moore*. This is said to have been framed by that ingenious lawyer for the satisfaction of the *Lord Norris*, who wanted to conceal from his family

(a) 34 and 35 Hen. VIII. *Dyer*, 55. 2.(b) 36 Hen. VIII. *New Cases*, 135.

the settlement of his estate; a matter that could have created no difficulty but in the interval between the statute which enjoined the inrollment of a bargain and sale, and this determination in favour of covenants to stand seised. This method of conveying was probably copied from the common-law assurance by a lease, and afterwards a release, as practised in the time of Henry VI. and Edward IV. (a) The way of ordering a lease and release was this: First, a bargain and sale was made of a term for years, which the statute just mentioned not considering, we may suppose, of sufficient importance, does not require should be inrolled: the bargainee being thus possessed of the term, by force of the statute, was in a capacity to receive a *release* of the inheritance. The deed of release contained the whole settlement of the estate so conveyed, to the various uses and purposes intended to be provided for.

After attempts to limit estates in perpetuity had been so often made, and so repeatedly discountenanced and defeated by our courts, these new conveyances to uses were laid hold on as a mode for making a fresh experiment on this subject. Being a modern invention, and confessedly in defiance of the ancient course of the common law, it was perhaps thought that such estates as might not after former precedents be limited in possession, might yet be declared in use. The nature of an use seemed to favour this inclination to convey and shift property by the limitations of a deed: it was a creation of the feoffor's, was wholly at his disposal, and was cognisable in a court where the dictates of general reason and equity were supposed to supersede the rigid precedents of a partial and antiquated system. It was probably owing to ideas like these, that many of the limitations of estates, which began to appear about this time, were made. In the thirty-eighth of

(a) Vid. ant. vol. III. 357.

Hen. VIII. there is mention of a conveyance of this kind, which was contrived for the purpose of preventing all the persons taking under it from breaking in upon the limitation thereby made. The grantor infeoffed two persons to the use of himself for life, without impeachment of waste; and after his death, to the use of his son and his heirs, until the son should assent and conclude to alien the estate, or any part thereof, or to charge or incumber it; and after, and immediately upon such assent and conclusion, to the use of *A.* and his heirs, with the same proviso, and so on to others (*a*). It appears that such devises were now very common; but none of them coming into court, we know not the sentiments of the judges upon them, and must wait till a subsequent period, when they underwent some discussion. These are "the upstart and wild provisos and "limitations" which are so reprobated by a great lawyer (*b*), in whose time they began to grow into great discredit; after the encouragement they had received by some adjudications in their favour (*c*).

The introduction of uses tended much to embrangle questions of real property, and the whole law of estates: these difficulties increased after the stat. of Rich. III. had given to *cestui que use* the same power over the land which the feoffees had before, and still continued to retain. When the stat. 27 Hen. VIII. conveyed the possession to the use, new perplexities arose of a similar kind. Before we take leave of this subject, it will be proper to give the reader some instances of these complicated questions, which we shall now do, without entering minutely into the arguments in which they were canvassed.

It has been before remarked, that the casualty of wardship was intimately connected with uses; and this fruit of tenure was the topic which most interested the king in the suppression of this new species of conveyance. In our

(*a*) 38 Hen. VIII. New Cases, 31. (*b*) Pref. 4 Rep. (*c*) Particularly by *Scholastica's case*.

law-books, in various cases, this connexion between uses and wardship appears ; and some of the most complicated questions relating to the latter arose from estates in use. A remarkable case of this kind was argued in the court of common-pleas, on a writ of ward brought by the abbot of Bury against *Elizabeth Bockenham*. Certain persons being seised to the use of *Bockenham* in fee, infeoffed other feoffees to the use of *Bockenham* and *Elizabeth* his wife, for her life, with remainder to *Bockenham* in fee. *Bockenham* died, leaving a son under age. The lands being held of the abbot, he brought his writ ; and it was a question, whether the infant should be in ward to the plaintiff. After frequent argument, the judges differed : *Shelley* and *Fitzherbert* holding that he should not be in ward to the abbot ; and *Baldwin*, that he should. No judgment was given ; but it is said that the abbot had the ward by consent ; agreeably with the opinion which afterwards prevailed, namely, that the heir was not in of the new use, but of the old one ; so that being in the old reversion as heir to his father, and not in of the new remainder by purchase, he should be in ward (a).

Two settlements made by the lord Burgh (which have been already mentioned for another purpose) gave occasion to a question upon the wardship of his grandson. In an indenture of covenant on his marriage, before the stat. 27 Hen. VIII. he declares the uses of a recovery to his son and his wife, and the heirs of the body of his son ; after the statute, the son had issue and died, leaving the issue within age : the land was holden of the king, and it was a question, whether the infant should be in ward to the crown, or out of ward, during the life of the mother. This matter was heard in the new *Court of Wards and Liveries* ; and it was held by the king's serjeant and attorney, by the attorney of wards, by *Brooke*, and others,

(a) 28 Hen. VIII. Dyer, 7. 11.

that the issue should be out of ward during the life of the lord Burgh, who was still the king's tenant; for having expressed no use of the fee, the ancient use of the fee-simple remained in him; and so when the statute passed, the possession vested in the son and his wife, as the use before did, and the fee-simple in the father, who was donor of the use. At the time of the same marriage, the lord Burgh settled other lands by covenant in this way; namely, "that his eldest son, immediately after his death, should have in possession, or in use, all his lands," &c. In this, as in the former, the question of wardship turned upon the fee-simple, whether it was out of the covenantor; and they held that it was not (a).

The breaking into old settlements, and then resettling the family-estate, as in one of the preceding instances, in a new way, furnished frequent questions of remitter. These were always difficult points, and were rendered still more complex by their connexion with uses. This will be evident from the following instances. Tenant in tail made a feoffment before the stat. 27 Hen. VIII. to the use of his wife for life, remainder to his son and heir in fee; after this the statute passed, then the feoffor died, and then the wife and the son entered; it was doubted, whether he should be remitted to the entail. *Dyer* seems to think he should not, because the statute executed the possession in him in the same manner in which he had the use, and that was in fee; but he thought the issue would be remitted. Again, a woman tenant in tail took husband, who made a feoffment before the stat. 27 Hen. VIII. to the use of himself and his heirs, and after having issue by his wife, he died: the wife died, the issue entered, and made a feoffment to the use of himself and his wife and his heirs, and then died, leaving an heir within age; then the statute 27 Hen. VIII. was passed; afterwards the wife died, and a

(a) 34 and 35 Hen. VIII. *Dyer*, 54. 1.

question arose, whether he was remitted to the entail. No decision was made in either of these cases; but in the following, which was of a feoffment in fee by a tenant in tail, who died his heir within age, after which the statute passed; it was adjudged, in conformity with the opinion of *Dyer* before-mentioned, that the heir was not remitted (a). The expectation in all these cases was, that because an estate was thrown upon the *cestui que use* by the statute, it was within the common-law notion of a remitter, that he should possess not in the form in which it was cast upon him by the law, but in his better or more ancient right, by remitter. But this reasoning was done away by another which was equally technical and refined; for it was answered by *Baldwin*, the chief-justice, that the estate was not cast upon the *cestui que use* by the law, but by *his own act*; namely, by an act of parliament, to which every man is a party (b). The better reason however was, that the statute gave the possession and seisin in no other way than the party had the use, and no seisin could be conveyed to an use which he had not.

Of wills.

The statute of wills may be considered as having introduced a new species of conveyance. A devise became now a common assurance, which effected a complete transfer of the freehold. We have seen, that many points had already been determined on wills of land devisable by custom, from which the formal and effective parts of a will were tolerably well settled; but a new turn was now given to these instruments. The practice of devising *uses*, where it was not the custom to devise the *land*, had lately made wills much more frequent than they had been. These, which were nothing more in effect than declarations of uses, became precedents for wills after the statute of wills: so that, in addition to the loose wording which was allowed in wills of land at common law, and the liberal construction

(a) 34 Hen. VIII. *Dyer*, 54. 21, 22.

(b) 28 Hen. VIII. *Dyer*, 23: 148.

which they received, in order by all possible ways to give effect to the intention of the deceased, however untechnically expressed; in addition to these properties and circumstances relating to wills of land, they were now to be considered, likewise, in the light of declarations of uses; and as such were to be interpreted with great indulgence and equity. These considerations rendered the subject of wills of land somewhat curious and complicated; especially when entangled in the distinctions and refinements with which entails and limitations abounded. The difficulty in all these cases was, how to effectuate the intention of a testator, without intrenching on some rule of law.

In reviewing what was done by the courts in forming and modelling the law of devises, our attention is first caught by those determinations which illustrate the remark we have just been making on the equity with which these instruments were construed, and the contrast which they, on that account, exhibited, when compared with grants. This constitutes the most interesting topic in the law of devises, and will demand our attention in a particular manner, as devises were now authorized by parliament, and the occasions for discussing them were more frequent.

The first information upon this head presents itself in the nineteenth of the king; when *Engle-* Construction of wills.
field states it as an acknowledged point of law, upon which he might argue, that a devise to a man in fee, and if he dies without heirs, then to another, was void in law; for a fee-simple could not by law depend upon another^(a). This is an instance in which no indulgence was allowed to a gift by will, beyond that of deed. This question was considered some few years afterwards, when a reason was given why the law would not suffer such a devise. A man had given his land to a religious house, by the custom of Lon-

(a) 19 Hen. VIII. 3.

don, which allowed lands purchased to be given in mortmain; with this condition, *ita quodd reddant* so much money yearly to the dean and chapter of St. Paul's; and if they failed, that their estate should cease, and the dean and chapter and their successors should enter. Upon an entry being made, it was held clearly by *Baldwin* and *Fitzherbert*, that the condition was void; for, said they, it could not remain after a gift of the fee-simple; the feoffor having determined his interest and right: besides, a stranger could not enter for the condition broken, but only the heir (*a*). It may be remembered, that the very reason given by Littleton why the limitations in *justice Richel's* will were void, was, because the heir, and not a stranger, was the proper person to enter for a condition broken (*b*). The distinction had not yet taken place between conditions and conditional limitations.

The same scruples which the courts had in allowing a fee to be given after a fee by will, were entertained respecting the devise of a chattel interest: they were as jealous of these perpetuities as of the former, though they began to relax in this reign as to the latter. A man possessed of a term for forty years made his will, and devised it to his eldest daughter, and the heirs of her body; and if she died without any, then to his second daughter in tail. The eldest daughter married, and dying without issue within the term, the husband sold it; and it was doubted, whether the second daughter had any remedy. It was there said by *Baldwin* and *Shelley*, that she had no remedy, the devise being against law; for a term could not be given in remainder any more than a chattel personal, as had been determined, they said, in the reign of Henry VI. *Englefield* thought the remainder was good, considering it was by will; and the intention of the testator was to be effected as well as it could. This was no more than, in

(*a*) 28, 29 Hen. VIII. Dyer, 33. 12.

(*b*) Vid. ant. vol. III. 324,

other words, that if the eldest daughter died without issue within the term, the second should have it. To this it was observed by *Baldwin*, that the cases were different; for he approved of a devise of a term upon condition, and that if the devisee died during the term, a stranger should have it; for then the whole term and interest would not be given, but only so much as elapsed during his life. But here the testator made an absolute unqualified gift to the eldest daughter. And he said that he had been concerned, when a serjeant, in a case similar to the present, and that was determined to be ill (a).

The former was a devise of a term *in tail*: it was afterwards laid down for law, that where a term for years, or other chattel was devised *for life*, with remainder over; there, if the devisee did not alien it, the person in remainder should have it. But if he had disposed of it, the remainderman had been without remedy (b). This was sanctioning an absolute gift of a chattel for life, with remainder over. In a subsequent case it was laid down so largely as apparently to warrant a remainder after an inheritance in tail, if the occupation and not the thing itself was given. For it is said to have been agreed for law, that the *occupation* of a chattel might be devised by way of remainder; but if the thing itself were devised to be used, the remainder would be void: for a gift or devise of a chattel, if but for an hour, was the same as for ever; and the donee or devisee might dispose of it as he pleased (c): an opinion that was not wholly novel (d). Thus was the rigour of the old law gradually softening, till these testamentary dispositions were at length recognised by the courts, under the name of *executory devises*, which ought, in reason, to be supported and rendered effectual.

Whenever the judges could dispense with the rigour of the old forms of conveying property, they were ready

(a) 28 Hen. VIII. Dyer, 7, 8.

(b) 33 Hen. VIII. New Cases, 49.

(c) New Cases, 83.

(d) Vid. ant. vol. III. 369.

to give all assistance towards establishing a devise. The following is a strong instance of this favourable construction. A man had devised, that *T. S.* should have his land after the death of his wife: they held that, upon this devise, the wife should have the land for her life, because they thought it evident, from the manner of the gift, that the testator meant it so (*a*). In the following case, a rule of law was made to give way to the great object of fulfilling the intention of a testator. Land had been devised to two, *et hæredibus eorum*; it was held by *Lord Audley*, then chancellor, that the surviving devisee should not take the entire estate by survivor, but only a moiety (*b*). Again, a devise to a man and his heirs male, was construed by *Fitzherbert* and *Shelley* to be clearly an estate tail, without the word *body*; because it appeared the intention of the testator that it should be so (*c*). Where a man willed that his feoffees should make an estate to *I. N.* and the heirs of his body, this was supported as a complete devise, because of the testator's intention (*d*). If a devise was made to *I. N.* without adding any thing more, it would, like a gift or grant, be only for life; but this might be explained by circumstances to mean a larger estate; as where it was said, "paying 100*l.* to *A. B.*" this was held to give a fee-simple; and if the devisee did not pay it himself, his heir or executor might (*e*).

No point in the law of devises had created more discussion than the power delegated to executors to sell land. A statute was made in this reign to remove one difficulty, but many still remained. The following is an instance where a question of this kind was argued with much difference of opinion. A man devised land to his son in tail; and if he died without issue, he willed that *A.* and *B.* his executors should sell it. *A.* died, *B.* survived, and made *M.* his exe-

(*a*) 29 Hen. VIII. New Cases, 80. (*b*) 30 Hen. VIII. Ibid. 81. (*c*) 27 H. u. VIII. 27. (*d*) 38 Hen. VIII. New Cases, 82, (*e*) 29 Hen. VIII. New Cases, 277.

cutor, and died: then the son died without issue, and *M.* sold the land; the question was, whether this sale was good. This case was argued in the exchequer-chamber before all the judges; when it was agreed by all, except *Norwiche, Fitzherbert, and Moore*, that the sale was not good. The three dissenting justices urged the old rule of law, that the will of the testator should be supported by all intendments, though not expressed in clear words. Thus a devise *in perpetuum* was construed a fee-simple. A devise "to give and to sell as he pleases," had been construed a fee-simple, because the meaning of the testator in these two cases appeared to be such. So here the testator must have been aware, that the estate tail might last beyond the life of his two executors; and therefore he meant that the land should be sold by their representatives, that being the only way in which the executors could sell. Thus, they said, if a man willed that his feoffees should sell; yet if it happened that the land had been passed by recovery or fine, and not by feoffment, then the recoverors or conusees would have the power, because it was the testator's intent that those who had the land should sell it; and that was of more importance than the particular name under which they held it. If a will was, that after the expiration of an estate tail, the chief-justice of England should sell the land, it must mean the chief-justice for the time being, and not at the time of making the will.

On the other side it was said, that this was not a testamentary donation, but a *power* to a particular person to do a certain act; and as that related to the disposal of land, and so required more circumstance than the disposal of personal things, they thought it should be construed more strictly on that account; for a person might give a verbal direction to dispose of any chattel to another; but if he would give authority to make livery of seisin, it must be in writing. The law so much favoured the inheritance in preference to the disposition by will, that if there was any

thing uncertain and doubtful, the land would go to the heir. Thus if a will was, that *H.* should sell land, and he died before he had sold it, it should not be sold at all; for the heir of *H.* could not sell under the words of the will, it being a trust in *H.* which if he did not perform according to the will, the land would go to the heir of the testator. Again, if a testator directed that *B.* and *C.* should sell his land, *B.* could not alone sell it, because the trust was joint. The same of a letter of attorney to two to make livery, one could not make it; and if to one, he could not transfer the trust to another. If I desire a person to seal an obligation for me, he could not authorise another to do it. So in the present case, the two executors could not, much less could the one who survived, give the trust to another, namely, to their executors.

As to the intent of the testator, they said, that could be carried no further than his words would support it; for every one must allow, that where a will authorized such a prior or such a mayor to sell his land, and there was no such mayor or prior, that the land could not be sold, notwithstanding it was the testator's intent that it should. In many cases a will failed of its intention, either on account of the uncertainty who was to execute it, or of the person who was to execute it failing; as if a testator had willed that his executors should sell his land, and afterwards forgot to name any, or willed that it should be sold, but did not say by whom; in all these cases the will would be so far void. But if land was to be sold by the heir of *B.* this was such a general term as would include every heir to the twentieth degree, as well *ex parte matris*, as *ex parte patris*; but if *B.* died without heirs, or was attainted, the land could not be sold.

The testator, in the present case, being *cestui que use*, the justices took occasion to consider the devise in that light; and it was agreed by all of them, that before the stat. 1 Rich. III. a will of land made by him who had the use was

not good, unless the feoffee would concur in substantiating it; and now, they said, it was only by equity of that statute that a will by *cestui que use* was good. They said, that when this power was given to his executors, the term *executors* was a *descriptio personæ*, and did not mean all persons who by law might become executors, as by stat. 25 Ed. III. c. 5. executors of executors; and they said, in this case, if *A.* and *B.* had declined administering the effects, they, though not really executors, might still sell under the power (*a*).

Such were the arguments on both sides of this question. It was probably owing to this ample discussion that the parliament, about two years after, came to a resolution to remedy the consequences which followed from some of the opinions here delivered for law. It was declared by stat. 21 Hen. VIII. that when one or more of the executors refused to take upon them the administration, the others who had might sell. This, however, left untouched almost every thing delivered above; which, after the agreement of so many judges, must be considered as the law of the time. It seems too as if this statute had been construed by equity so as to authorize certain acts which were not legal on the principles of the above resolutions of the judges. In the thirtieth of the king, where land was to be sold by the executors after the death of *J. S.* and the testator made four executors and died, and then two of the executors died, and then *J. S.* died; it was held by some, that the two surviving executors might sell, because the time for selling was but just then arrived (*b*); and that was also the opinion of *Brooke* (*c*).

The next object is the jurisdiction of courts. The alterations and innovations that were made in our judicial polity by parliament have already been related. Henry made others by his own authority. The natural course of

(a) 19 Hen. VIII. 9.

(b) 30 Hen. VIII. New Cases, 82.

(c) 30 Hen. VIII. New Cases, 81.

events will always contribute to give a new turn to the practice and proceedings of courts. We have seen how the king's bench had acquired an accession of civil business; and in what manner that was increased by the disuse of real actions, and the increase of actions upon the case. But with respect to these, they made some distinction. Some of these were considered as not proper subjects of cognisance here. It was held in this reign, that an action upon the case against an hostler, for a horse stolen out of a common inn, would not lie in the king's bench; the same opinion prevailed where a person negligently kept his fire (a); and in some other instances.

The court of chancery. It is stated by a writer of this reign, that the court of chancery would give relief in covenants made without writings, if there were sufficient witnesses to prove them; and discovery of evidences might be obtained there, when the plaintiff knew not the certainty of them, or what they contained. A singular piece of equity was administered in the following instance, which is mentioned as a common course of relief in that court. A man bound in an obligation was sued in a county where the deed was not executed: the obligor brought his bill, surmising, that by such foreign suit he was ousted of divers pleas which he might have had, if the action had been brought in the proper county: this was conceived a proper subject for relief in equity; which was, we may suppose, by injunction (b).

The jurisdiction of this court was greatly enlarged during the time that cardinal Wolsey presided there. He chose to exercise his equitable authority over every thing which could be a matter of judicial inquiry. At length, finding himself loaded with the number of petitions, often full of untrue surmises and frivolous complaints, he grew weary of attending to all these himself; and therefore, as well for his ease at all times, as to provide persons to supply his place when absent on political avocations, he caused

(a) Div. of Courts.

(b) Ibid.

four courts to be erected by commission from the king. One of these was held at Whitehall; another before the king's almoner, Dr. Stokesby, afterwards bishop of London; a third at the treasury-chamber; the fourth at the rolls, before Cuthbert Tunstall, who was then master of the rolls, and used, in consequence of this appointment, to hear causes there in the afternoon (a).

This was the first instance of the master of the rolls hearing causes, he having before been only the principal of that council of masters assigned for the chancellor's assistance; nor is there any notice of a person being authorised to hear causes in the chancellor's absence till now, when not only the master of the rolls had this delegated jurisdiction, but also the several courts just mentioned.

The cardinal maintained his equitable jurisdiction with a high hand; entertaining in one department or other complaints of almost every kind, and deciding with very little regard to the common law. This conduct in his judicial capacity furnished grounds of accusation against him, when articles were exhibited containing an enumeration of all this great minister's offences. He was charged with having examined many matters in chancery after judgment given at common law, and obliging the parties to restore what was taken under execution of such judgments (b). He was accused of granting injunctions without any bill filed (c); and when those would not do, of sending for the judges and reprimanding them (d). There is no mention of these courts which he had procured to be established; and which, probably, at that time were thought perfectly legal under the king's commission. After all, notwithstanding these complaints of the cardinal's administration of justice, he has the reputation of having acted with great ability in his office of chancellor; which lay heavier upon him than

(a) Hist. Chanc. 55.

(b) Articles against Wolsey, 20.

(c) Ibid. 21.

(d) Ibid. 26. 4. Inst. 92.

it had upon any of his predecessors, owing to the too great ease with which he entertained suits, and the extraordinary influx of business which might be attributed to other causes.

This ceased with the removal of the chancellor; and the business there soon sunk to its natural level, perhaps rather below it. It is said, that sir Thomas More, in 22 Hen. VIII. read all the bills himself; that on some of the days in term there was no cause nor motion; and that at one time he had actually dismissed every cause in his court. The statutes of wills and of uses, in a course of time, supplied new materials, and furnished full employment for the chancellor, who again began to stand in need of assistance; which led to confirming the master of the rolls in his new judicial authority.

The chancery. As the chancellor was to administer justice according to the dictates of his conscience, some persons were curious to inquire to what duties in the discharge of his office the same obligation of conscience ought to bind him. In this point they seem to have rigidly exacted a scrupulous exercise of his duty from this judge of equity. It is declared by an advocate for this new court, that if the chancellor granted a subpoena without taking surety, as required by stat. 15 Hen. VI. c. 4. and, the matter of the bill being found untrue, the plaintiff was unable to satisfy the damages the defendant had sustained, the chancellor was bound in conscience to yield them. Again, if a bill was brought after judgment passed in the king's court, and he took sureties that were afterwards found insufficient, and the bill was proved untrue, he would be bound to render the damages, because it was enacted by stat. 4 Hen. IV. c. 23. that judgments in the king's courts should not be examined in the chancery, parliament, or elsewhere. So if the chancellor gave judgment upon vehement conjecture, or other information without proof, and better information was offered him, he was held to be bound in conscience either to amend his sentence, or make restoration to the

party of all he lost by it. But if he proceeded upon proofs that turned out to be untrue, no redress need be made, because he had resorted to that trial which was appointed by law; for the better opinion seems to have been, that the chancellor was to determine *secundum allegata et probata*; and not according to his conjectures and surmises, as some held, under an idea of reaching the real truth of the case; and it was accordingly held, that if a person had no proof by witness, in writing, or otherwise, he could have no remedy in chancery. The chancellor, however, might so far exercise his discretion, as, upon a very special cause, and not otherwise, to admit a person, as well after publishing of witnesses as before, to allege any new matter that had recently come to his knowledge. For the like purpose, a great latitude in pleading was allowed. They held also, that he might suffer the parties to change their demurrer, which was not allowed in any other of the courts. Again, a double plea, or departure in pleading, or two pleas, where one went to the whole bill, were considered as no irregularity in chancery; for the truth was to be investigated by any possible means, except surmise or conjecture.

Some went so far as to make the chancellor liable in conscience if he granted a subpoena on a matter cognisable at common law; others made a distinction where the matter was apparent, and where it was doubtful; others would make him answerable for unnecessary delays in suits. But all these were refinements that ended in mere speculation; for the chancellor, being a judge of record, was not compellable by law to make amends to any one for errors of judgment, or for any judicial proceeding directed by him (a).

Notwithstanding the chancery was now long established in possession of its equity-jurisdiction, there were not wanting advocates for the ancient common law, who took upon them to controvert this novel practice by subpoena: this led to a discussion, in which the nature of this

(a) Harg. Tracts, vol. 1. 348.

jurisdiction was canvassed on both sides very strenuously, but with very different force and success.

Those who questioned this new judicature contended, that it was unreasonable for the chancellor to dispense with the common law of the realm in favour of a particular person, who by some negligence or folly had disabled himself from obtaining redress in the usual course of proceeding : that what was so done in the chancery was contrary to the common law ; and if it was right and lawful, the common law must needs be abrogated, for two contrary laws ought not to prevail at the same time. They marvelled how the chancellor dared to issue writs of subpoena to restrain persons from obtaining redress at the common law, which the king himself could not do by law. The judges were sworn to administer the law indifferently, which the chancellor was not ; the serjeants were sworn to see the king's subjects justified by the law, determinable by the king's judges, but not by the chancellor ; all which was contravened, if any man could be stopped from his suit by subpoena. Again, if the known law of the realm was to be over-ruled by the discretion of one man, what dependence could the subject have ? conscience, the great criterion of decision in this court, being too variable and unascertained to be a rule of judicial determination.

They attributed the great licence of chancellors to their being most commonly spiritual men, ignorant of the common law ; who, trusting to their own sagacity, thought they could correct with ease what appeared to them to be defective in the ancient law of the realm. And yet whoever looked into the *Natura Brevium* would find, that the common law had provided remedies for most of the injuries that could be sustained, although there was no mention of any writ of subpoena ; which, if authorised by the common law, would surely have been inserted there for the instruction of students. Finally, they contended that the whole proceeding by subpoena was in direct violation of

stat. 20. Ed. III. by which neither the chancellor, nor any other, ought to send any writ or writing to any justices to prevent their proceeding according to the common law of the realm; for, said they, it is the same mischief to send such writ to the party, as it was before that statute to send it to the justices; and such writ could not be justified any more in the one case than the other. In all these attacks upon the court of equity, they never failed to inveigh against uses, as a crafty and illegal innovation (a).

On the other side it was alleged, that writs of subpoena had issued during the times of so many chancellors both spiritual and temporal, in the reigns of so many kings, that it must not be presumed that they acted without good authority of the king and his council, and with the knowledge of the whole realm. That it appears from reports of years and terms, that the chancellors in matters of doubt had called in the advice of the judges, who had given their sanction to the application of this writ. They alleged the stat. 17 Rich. II. giving damages, and stat. 15 Hen. VI. requiring sureties of the plaintiff, which were parliamentary recognitions of the authority assumed by the chancellor. And as to stat. 2 Ed. III. c. and stat. 20 Ed. III. c. they said, the subpoena was always directed to the party, and not to the justices; and therefore, when the party surceased to call upon the justices for further process, they surceased to give it him; but, if it was directed to them, they need not pay obedience to the writ.

As to the objection, that giving relief in chancery contrary to the common law was setting up two laws in the

(a) These sentiments are contained in a manuscript tract of the time of Henry VIII. intitled, "A Replication of a Serjeant to certain Points alleged by the Student in St. Jermyn's Dialogue;" and those which follow are contained in a manuscript tract ascribed to St. Jermyn, written in answer to the supposed Serjeant, and in support of what had been alleged in favour of the court of chancery. These two ancient pieces are printed in the first volume of Mr. Hargrave's Collection of Law Tracts.

kingdom, they said, that although a man shall not at common law plead payment of an obligation without writing, but in chancery he shall, yet the law in both courts, as to the right of the debt, was the same. The judges knew as well as the chancellor that a payment discharged the debt in reason and conscience; but by the maxims and customs of the law of long time used, they could not admit payment only as a sufficient plea, though they did not pretend that such maxims and customs extended to all courts. In like manner, in an action on an obligation under forty shillings in the county, hundred, or court-baron, the defendant might wage his law; and in London he might confess the deed, and pray that it might be enquired what was due upon it. So the superior courts had respectively different customs. Thus in the common-pleas an outlawry might in some cases be reversed without a writ of error, but never in the king's bench: in the former court, upon the first default on a *scire facias*, execution was awarded; but in the latter, an *alias* used to issue. Why, therefore, might not certain rules hold in chancery, that did not hold in the king's bench and common-pleas? Further, the chancery differs from itself in practice; for if an officer was to sue there by privilege on an obligation, payment could not be pleaded, any more than in the king's bench or common-pleas, without writing; but the defendant must pray an injunction, and go on by bill and subpoena. It seemed, therefore, to them to be an advantage to the subject that the rule of law should still prevail in the courts of common law; but that the court of equity in chancery should be at liberty to proceed without the restraint of it.

As to the chancellor preventing by this writ the progress of suits, which could not lawfully be done by the king, they said, the king's oath was, that "he shall grant" to hold the laws and customs of the realm;" but if the laws and customs of the realm are, as well those in chancery as those at common law, as they were just shewn

to be, then the chancellor might administer justice by subpoena. And though the chancellor was not bound by oath to do justice, yet he was bound by conscience, and more deeply than the judges; for he must form his judgments according to the law of God or of reason, or the law of the realm, grounded upon those laws. If he erred, therefore, there was greater fault in him than in the judges; for these grounds of decision were more evident than the general maxims and some customs of the realm. For the chancellor need not meddle with the general rules of the law, nor with writs, nor forms of pleading, which constituted the greatest difficulties of the law. They thought the reason why no writ of error lay upon a judgment given on subpoena by the chancellor, might be, because the law presumed that no man could err contrary to laws so plain and evident; and if he did err, he was bound to reform it, or to make restitution, more so than the judges of the common law; for judges might sometimes give judgment against their own knowledge, but the chancellor was never bound so to do; not being bound, as they were, to any special forms of trial or proceeding.

They contended, that no danger was to be apprehended from the discretion and conscience of one man, when put in contrast with the judgment of the common-law; for the chancellor was always a person chosen by the king for his singular wisdom and integrity, and he was to be governed by the law of God, of reason, and of the realm, not contrary to the two former laws; and by these rules he was to order his conscience. Thus if, before the statute of wills, a man devised his land in fee, the chancellor was bound to determine this will to be void in conscience, because it was void in law. So that it was not a scrupulous or capricious determination of the chancellor's mind, but a legal discretion dictated by the abovementioned considerations that was to govern him in his decisions. They denied that the common law had provided sufficient

redress for all injuries in the common-law courts, without the aid of conscience; and they said it was no objection to the writ of subpœna, that it was not to be found in the *Natura Brevium*, that work being defective in many other particulars; not containing the action upon the case, writ of forcible entry, and many others, which were undeniably warranted by the common law (a).

We may close what is here said of the court of equity by a passage in the life of a very eminent chancellor, who has been before named. Sir Thomas More being informed that the judges had expressed their disapprobation of the injunctions he had granted, caused a docket to be made of every injunction, and the cause of it, which he had granted while he was chancellor; and inviting all the judges to dine with him, in the council-chamber at Westminster, he introduced the subject after dinner; when, upon full discussion of every one of them, the judges confessed that he could have acted no otherwise. He then offered, that if the judges of every court, to whom it more especially belonged, from their office, to reform the rigour of the law, would, upon reasonable consideration, by their discretion, and, as he thought, they were in conscience bound, mitigate and temper the rigour of the law, no more injunctions should be granted by him. To this they would make no engagement; upon which he told them, that as they themselves forced him of necessity to issue injunctions to relieve the people's injuries, they could no longer blame him. We are informed, that afterwards, in a confidential conversation, he accounted for the backwardness of the judges in the following manner: That they saw, how, by the verdict of a jury, they might transfer all difficulties and odium from themselves to the jurors, which they considered as their great defence and security; whereas the chancellor was obliged to stand alone the assault of every malignant observation (b).

(a) Harg. Tracts, vol. I. 337. 351. (b) Rooper's Life of Sir Tho. More, 58.

The court of requests began in this reign to be strengthened by a particular commission, and to rise into greater consideration than it had before enjoyed. When this new authority was added to it, is not easily ascertained: it is not probable, that it was before the 21st year of this king; for this court had not then acquired so much notice as to be mentioned by the book *Of the Diversity of Courts*, written in that year. It is not mentioned in the treatise of *St. Jermin*, called "Doctor and Student," nor in any of the Reports of this reign: though we find that stat. 32 Hen. VIII. c. 9. punishes perjury committed there; and Lambard says, he had seen the Book of Entries belonging to this court, in a regular series from the 8th of Henry VII (a).

This court was derived from that grand source of judicature which we have so often mentioned as residing in the king, to be exercised in such cases as were not provided for in the ordinary course of justice. As some of the complaints preferred to the king were referred to the council, some to the parliament, and some to the chancery; so others, particularly petitions offered by poor persons and those of the king's household, were referred to some one or two of the council, with a bishop, some doctors of the civil and canon law, and some common lawyers, who were called *Magistri à libellis Supplicum*, or *Masters of Requests*. These persons used to hear and determine them according to their best judgment and discretion. This species of cognisance had now grown into a court of some consequence, partaking of the nature of the chancery as to its measure of decision; but still confined to the suits of poor persons, and those of the household; which qualifications were usually suggested in the bills of complaint (b). In that character it subsisted for many years, till it was abolished, like others of a like equivocal nature, by parliament (c).

(a) Lam. Archeion, 223.

(b) Ibid. 228.

(c) Namely, by stat. 16 Car.

Though Wolsey's courts fell with him, we find the king erecting several new judicatures in the like way. We have before seen, that Henry had established a tribunal under the stile of *The President and Council in Wales*: this was done by letters patent, without any authority from parliament. Henry erected another court by letters patent, called *The President and Council of the North*. After the suppression of the lesser monasteries, some disturbances and insurrections had broke out in Lincolnshire and Lancashire, under pretence of vindicating the cause of the injured churchmen: upon which Henry, in order to prevent the like commotions upon the dissolution of the remaining religious houses, which he then had in contemplation, as well as to preserve the general order and peace of the northern counties, established, in the 31st year of his reign, this new jurisdiction. This court, as it was formed after the example of the king's own council, had, like that, a general authority, not well defined: it had two commissions; one of *oyer and terminer*; another, empowering them to hold plea of real and personal actions, where either of the parties were so poor as to be unable to pursue the common course of legal redress; and the judges were to give sentence either according to the law and custom of the realm, or in an equitable way, according to their wisdom and discretion. This accommodation of a court to decide civil questions without the expence and tediousness of the common law, was conceded in compliance with the earnest request of the rebels themselves. What other authority the commissioners had, used to be set forth in the commission, which generally gave them powers of superintendance and enquiry as to the police and government of that part of the country. In after-times, the commission used to be made in a general way, in order to conceal those extraordinary powers with which they were to be armed; and contained a reference to secret instructions by which they were to be directed. These courts

sealed instructions, as they carried in them something suspicious, excited much clamour at different times against the very being of this court, and at length contributed to its dissolution (a). There was a court called "the President and Council" erected in the West, by stat. 32 Hen. VIII. c. 50. with the same authority as this in the North, and that in Wales.

Such were the courts that were now employed in the administration of justice. We shall next make a few observations on the personal actions now in use, having enlarged sufficiently on real remedies in the earlier parts of this History. The effect of covenants and agree- Action of covenants.ments was a source of endless debate in the courts

of law; and as personal property increased in value, all contracts concerning it became more serious objects of litigation. The law upon this subject was now better understood, and more fully explained than in any of the foregoing periods. In pleading to an action founded on covenants, they had lately got into a concise way, which was not approved by some eminent judges. In 26th of the king, in an action of debt on a bond for performance of covenants in an indenture containing many covenants, the defendant had contented himself with rehearsing the condition and the indenture, and then saying generally that he had performed all the covenants. This general pleading was reprobated strongly by *Englefield*, *Shelley*, and *Fitzherbert*, who required, he should answer specially how he had performed every one. The latter judge said this manner of pleading had obtained within the last two years; but it was a corrupt method, and he shewed himself resolved to set his face against it (b).

A point of pleading was much agitated on the occasion of another action on bond for performance of covenants. The defendant pleaded that the indenture contained two

(a) Namely, by stat. 16 Car. I.

(b) 26 Hen. VIII. 5.

covenants, which he set forth, and shewed how he had performed them; he said there were other covenants, and he recited them; but he added, that he was an unlettered man, and only the first two covenants were read to him, which he had performed, as beforementioned; therefore he prayed *judgment of the action*. To this the plaintiff demurred; and the judges were equally divided upon the conclusion of the plea; *Fitzherbert* and *Brudnell* holding the conclusion to be good, while *Pollard* and *Brooke* maintained the contrary. The question was considered as turning upon this point, whether the indenture was void in the whole or in part. Those who thought it was void only in part, held the conclusion of the plea to be good; for having actually sealed and delivered it, he could not plead *non est factum*, and at any rate it was his deed, as far as he assented to the contents. The other two judges said, that as only part was read to him, the whole was void; and therefore, after stating in his plea the special circumstances, he ought to have concluded, *issint non est factum* (a).

The action upon the case had become so common, and it had been found so generally applicable, that it was laid down by one of the judges in this reign, that where no other remedy was provided by the law, an action upon the case would lie (b). Some interesting points arose upon these actions, whether they were founded on torts, or contracts. It was not yet settled that the *assumpsit* would lie against executors. A case of this kind happened in 12th of the king; the testator had agreed to pay for goods, if the purchaser did not; upon this promise the goods were delivered, and now an action was brought against the executors upon the promise. The report says, it was held by all the justices, that the plaintiff should recover, for two reasons; first, because he had no remedy at law but by this action; secondly, because the plain-

(a) 14 Hen. VIII. 25.

(b) 14 Hen. VIII. 31.

tiff had delivered the goods on the promise of the testator ; and as there were sufficient assets, *the testator's soul should not be put in jeopardy* by the prejudice his promise had done the plaintiff. To this it was added by *Fineux*, chief-justice, that this did not come within the rule of *actio personalis moritur cum persona*, which only applied to personal injuries. A quære is added by the reporter, whether, if the testator was living, this action would lie against him, or, whether he might wage his law in such a case (a) ?

This doubt prepares us for an observation made many years afterwards upon this decision. In the twenty-seventh of the king, it was demanded of *Fitzherbert*, whether a man might have an action upon the case against executors for a debt due by the testator ; it seeming reasonable, so long as they had assets, that they should pay all the testator's debts. To this *Fitzherbert* answered, that he should not have this action, nor any other ; for, by the death of the testator, all debts due by simple contract died also. He said, he was counsel for one *Clement*, in the twelfth year of the king, in an action upon the case against executors, (the same which we have just mentioned) and that *Fineux* and *Coningsby* adjudged the action to be against the executors : But, says he, I take the law to lie clearly otherwise, and they did that without any advice, upon their own opinions merely. And when he was told that the case was reported in that year, he recommended it should be expunged from the book, for it was certainly not law (b). The learned judge does not give any reason for his opinion. An action of debt would not lie against executors for a simple contract debt, because the testator might have waged his law ; and the executors not having that privilege, it was thought reasonable that they should not be liable to any action. Perhaps he thought this new-fangled action should not have greater efficacy than

(a) 12 Hen. VIII. c. 11.

(b) 27 Hen. VIII. 23.

the ancient remedy; and that the circumstance of law-wager not lying in this action should make no difference. Whatever were his reasons, this opinion of *Fitzherbert* seems to have governed the courts in the remainder of this reign; for in the thirty-seventh year, it was agreed that this action would not lie against executors (a).

The nature of *assumpsit*, and the distinction between this action and an action of debt, is a little explained by the following case. A man had come to the wife of the keeper of the compters, and promised, if her husband would let one *Tatam* out of prison, he would pay the debt to her husband on such a day, if *Tatam* did not. She related this to her husband, who agreed to it, and discharged *Tatam*; and upon the money not being paid, he brought an action of *assumpsit*, as of a promise to himself. This evidence was objected to, as not supporting the declaration: and it was argued in arrest of judgment, that the action should be debt and not *assumpsit*: but the whole court held the *assumpsit* to the wife to be sufficient to charge the defendant to the husband; and that the action was right. They said, that the agreement of the wife in the absence of the husband was good till he disagreed; like a feoffment to a wife, which would be good till the husband disagreed, and upon his agreement would be good for ever. Most acts of the wife might be thus ratified and made binding in law, by the husband's confirmation. At to the action, though one of the justices thought that he might have either debt or *assumpsit*, yet the other three were of opinion that he could not have debt, but only this action. They said, that debt would only lie where there was a contract; and in this case, as the defendant had not *quid pro quo*, the plaintiff could not have debt; but his claim was founded wholly on the *assumpsit*, which sounds merely in covenant; so that if there had been a specialty, he

(a) *New Cases*, 7.

would have had a writ of covenant ; but not having a specialty, he could only have his action on the case. They recollected a case which had lately been adjudged, where a person came with a man to a baker, and desired him to give the man some bread, and he would pay for it if the man did not ; and a special action being brought upon this promise, it was adjudged, upon demurrer, that the action lay : and they said that debt would not lie in such case, because there was no contract between the plaintiff and defendant (a).

An idea had prevailed, as has been just observed, that the action upon the case was a sort of supplementary remedy to come in aid of such persons as could find no specific remedy among the old writs. Conformably with that idea, it was argued by the counsel in this case, that as the plaintiff could have no action of debt, he ought by no means to be supported in this new writ : but the whole court denied this ; and it was said by one of the judges, that a person might chuse which of two remedies he would rather pursue. Thus, if a person bailed goods to another, and they were destroyed, or spoiled, he might have his election between an action of detinue and one on the case. It should seem from this reasoning, as well as from the case just mentioned, that though this was a remedy peculiarly adapted to special cases, grounded on *express* promises, yet it had become the practice to bring this action for the recovery of simple contract debts, by stating the debt to arise upon a promise to pay, and then, when a debt was proved, construing such legal debt to *imply* a legal promise. When the validity of such actions grounded only upon *implied* promises, was agitated in a subsequent reign, many records of this and an earlier period were produced, to shew that it was no new device ;

(a) 27 Hen. VIII. 24.

but these precedents all passed *sub-silentio*; for there is no mention made of any such in our books, unless the following may be considered as such: for in the thirty-third of Henry the eighth, in an action upon the case, on an assumpsit to pay 10l. the defendant pleaded that he had waged his law in an action of debt for the same sum; and this was held a good bar (a). We find another action on the case, for that the defendant promised to pay 10l. which he owed to him for a horse and cow (b).

To return to special actions of assumpsit. We find in the thirty-fourth of the king, an action of assumpsit on an insurance of a ship: the declaration was, that whereas the plaintiff was possessed of certain wine and other merchandize in a ship, the defendant promised for 10l. to satisfy the plaintiff in 100l. if the ship and goods did not arrive safe. Besides the form of action, which is alone to our present purpose, it may be remarked, that this action laid the goods, &c. to be in the parish of St. Dunstan's in the East in London; and though in truth the bargain was made beyond sea, yet they held it well; for in such an action as this, which was not local, the place was declared to be immaterial (c). There appears an action on the case, for that the plaintiff had delivered goods to the defendant, and the defendant had *promised* for ten shillings to keep them safe, but did not (d). This seems to be another novel action of *assumpsit*.

Among actions upon the case for torts, we find the following. In an action for a nuisance in stopping a river, so as to make it rise on the neighbouring grounds, it was objected, that the proper remedy was by assise of nuisance, and not by this action; and the whole court laid down this distinction: That where a man's way is stopped entirely, so as no passage remains, there the remedy is

(a) New Cases, 5. Vid. S. P. 2 Rich. III. fol. 14.
New Cases, 5. (c) 34 Hen. VIII. New Cases, 7.
New Cases, 4.

(b) 33 Hen. VIII.
(d) 26 Hen. VIII.

by assise; but where only part is stopped, so that one may pass with difficulty, there it is by action upon the case (a). If a nuisance was in the king's highway, and was therefore a public nuisance, yet every one who received any particular damage therefrom, might still have his action on the case (b). Where an action was brought for words, in calling the plaintiff *heretic*, and one of *the new learning*, it was held clearly that it would not lie, being merely a spiritual matter; for if the defendant was disposed to justify and shew in what respect the plaintiff was a heretic, the temporal court could not judge of it; and it was not like where the court had cognisance of the principal matter, as where a man was called traitor, or felon. Again, if he had called him *adulterer*, this being a spiritual matter, an action would not lie for it. But *Fitzherbert* said, that where things were of a mixt nature, as where a man was said to keep a *bawdy-house*, he might elect whether he would have his action here or in the spiritual court. They added, that if an indictment of heresy was found before any temporal judge, all he could do would be to certify it to the bishop (c). Though a defendant was allowed to justify, and say, that the charge was *true*, it was not enough to say, that it was the common report that he was a *thief* (d).

If there was any doubt, whether an action of *assumpsit* used at this time to be brought on *implied* promises, upon a buying and selling, instead of the action of debt; there is none, that an action had lately been framed to supply the place of that of *detinue*; for we find more than one instance of such during this reign. Perhaps that just men-
tioned, where the defendant had promised for ten shillings to keep the plaintiff's goods safe, might be reckoned as one instance; for in the old law, that would have been a

Of trover.

(a) 14 Hen. VIII. 81.

(b) 27 Hen. VIII. 27.

(c) 27 Hen. VIII. 14.

(d) 26 Hen. VIII. 9. 27 Hen. VIII. 22.

proper subject of detinue. But those which seem to carry a stronger affinity to the action of detinue, were grounded not upon a *promise*, but a *tort*; and the declaration made much the same suggestion as that in detinue. Thus one of them charges, "that the defendant *found* the goods of "the plaintiff, and delivered them to persons unknown:" another—"that whereas the plaintiff was possessed of certain goods, the defendant *found* them, and converted them "to his own use(a)." Another was, "that the goods of "the plaintiff came to the hands(b) of the defendant, and "he wasted them(c)." In this manner did the action upon the case, in one shape or other, spread itself over many of the old writs; and as it had now become applicable to the most usual calls for legal inquiry, by being substituted in the place of debt and detinue, it grew every day more common.

The style of pleading in actions upon the case continued much the same as in the former period. It was most usual to deny that part of the declaration which led to the charge on the defendant; and sometimes the plea stopped there; at other times, they would add a denial of the charge itself, by way of conclusion. This will appear from the following instances. First, of *assumpsit*. In an action, which has been before mentioned, on the defendant's promise for ten shillings to keep safely goods delivered to him by the plaintiff, it was held by *Fitzherbert* and *Shelley*, that *non habuit ex deliberatione* was a good plea(d). Again, in an action, for that the defendant promised to pay 10*l.* to the plaintiff, which he owed to him for a horse that he bought of him; the plea might be, which sum he hath paid to the plaintiff *absq; hoc*, that he promised to pay 10*l.* which he owed to the plaintiff for a horse; or *absq; hoc*, that he owed 10*l.* to the plaintiff for a horse(e). This

(a) 83 Hen. VIII. New Cases, 6. (b) *Devenerunt ad manus.* (c) 34 Hen. VIII. New Cases, 6. (d) 46 Hen. VIII. Ibid. 4. (e) 33 Hen. VIII. Ibid. 5.

latter form of a traverse confirms the idea, that they considered the *owing* and the *promising* to pay, as the same thing; and that where the *owing* was disproved, the promise was likewise. In an action charging that the goods of the plaintiff came to the hands of the defendant, and he wasted them; the defendant pleaded, "that they did not come to his hands;" and it was held good; upon which the defendant gave in evidence, that they were not the plaintiff's goods (a).

In an action for shaving *cum novacula immunda et insalubri*, the defendant pleaded that he did not shave the plaintiff *cum novacula immunda et insalubri modo et forma*. In another, for not taking care of a horse, the defendant pleaded in the words of the declaration, that he did serve the horse well and with care, *absq; hoc*, that he served it negligently and improvidently in the form the plaintiff had alleged. Again, for not curing a horse, the farrier pleaded, that *non manucepit*, he did not undertake to cure it. For negligently keeping his fire, the defendant pleaded, *quodd ipse ignem suum prædictum salvè et securè custodivit, absq; hoc*, that he kept it so carelessly and negligently, that his neighbour's house was burnt for want of his care (b).

Sometimes they would take the allegations of the declaration by protestation, and then conclude with a kind of general issue: as, in an action for destroying a bond intrusted to the defendant to re-deliver on request; the defendant, *protesting* that he re-delivered it unbroken and untorn, for plea said, that he was in no wise guilty of the breaking and tearing of the writing obligatory (c). Thus were pleas in case conceived upon the principle of a justification, in the way of a trespass-pleading; and it was only by a traverse, if ever, that the conclusion was pointed into something like a full denial of the matter charged, and had the effect of a general issue. It was an option in the

(a) 34 Hen. VIII. New Cases, 6.

(b) Rastell's Entries, 3. 26. 426. 8.

(c) Rastell's Entries, 7.

defendant in most actions, whether he would plead the general issue of *not guilty*, or *non assumpsit*, as the case might be.

The action of debt continued in its former state, except that it was broke in upon, and superseded by the action of *assumpsit*, as has already been shewn. In the old law, this action had held a sort of *divisum imperium* over contracts with the action of acco^mpt, which also in like manner with the former lost ground in proportion as the *assumpsit* grew more into fashion. The principal inducement to recur to the *assumpsit* instead of these writs, was to preclude the defendant from his wager of law: when, therefore, a transaction was so circumstanced that the law would not allow this privilege, there was no reason for going out of the ancient track; and if the case was such as to be within the compass of those remedies, it was still usual to bring debt and acco^mpt.

Debt and acco^mpt.

It therefore sometimes happened as formerly, that a question would arise, whether debt or acco^mpt was the proper remedy in the matter in question? A case of this kind happened in the twenty-eighth of the king, which furnished such topics as will give a very good idea of the distinction then made between these two actions. *A.* had signed and sealed a *bill* acknowledging he had received a sum of money to lay out at Roan in French pruens, and see them safely shipped. Upon this an action of debt was brought against the executors of *A.* alleging that the money was not laid out in pruens: a verdict was found against the defendant; and though it was alleged in arrest of judgment, that the proper remedy was acco^mpt, and not debt, yet judgment was given, and a writ of error being brought, the same point was argued in the King's Bench, when the judgment was affirmed with the concurrence of *Fitzjames*, *Portman*, and *Spilman*, against *Luke*. The reasons upon which the dissenting judge supported his opinion were these. He said, that where money was bailed

for the buying of merchandize, it was clear if the money was not laid out that the action should be accompt; both, for the money and the profit that had been, or might have been made by detaining the money; for he was a receiver and accountable, and no action of debt lay without a contract. Thus, says he, if I become debtor to you for the debt of *T. S.* this does not make me liable to an action of debt, for it is *nudum pactum*. So if I bail to you 20*l.* to bail to *B.*; here *B.* for the same reason, cannot have an action of debt against you. However, it might be questioned, whether the *bill* would change the nature of the accompt into a matter of debt; but he thought not; though he admitted the force of some common cases: as where a horse was sold, and the vendee made an obligation for the money, there the nature of the contract was determined, because he was bound to pay the money according to the *obligatory words* in the bond: or where a judgment was recovered; for there the contract was gone, being changed into a thing of a higher nature. He admitted all this; but he said this was a different case; for there were in this *bill* no *obligatory words*, nor any thing that purported to be an obligation; but the bill was merely a proof and testimony of the accompt; and *non est factum* would be no plea, as the action was founded upon the receipt to render accompt, and not upon the bill. He quoted a similar case in the time of Henry VI. where a man brought an action of debt upon a contract before the mayor and recorder of London: the defendant there tendered his law: the plaintiff said it was the custom of London, that if a man put his seal to a paper, testifying a contract, he should be ousted of his law-wager; upon which the defendant demurred, whether the plaintiff had not by this plea abated his own action; and it was adjudged by the whole court that this well-maintained the action, and did not alter the nature of the contract, but was only a proof and testimony of the contract. He admitted, in the case at bar, that if the bill had gone on and said, "if I

“fail in laying out the money, it shall be re-delivered to the plaintiff;” the word “re-deliver” would have amounted to something obligatory, as had been adjudged in the time of Edward IV. But he thought this bill, as it had no obligatory words, was only a proof of the contract, and did not change the nature of it from accompt to debt.

The justices who were of a contrary opinion, argued in this way. They said, that admitting there was no bill testifying the receipt, yet by the opinion of all the books, it was in the election of the bailor to have debt or accompt in such case. They said, it was ruled in the time of Edward III. that if money was bailed to another on condition that on the bailee making assurance of certain land by such a day, he should retain the money for ever; but on not doing so, he should re-deliver it; if the condition was not performed, he was either accountable or a debtor, at the election of the bailor. It must be the same, if money was given to merchandise with, or to bail over, as to give in alms; the money in such cases is the bailor's, till it is given according to the trust; and he may countermand the gift, and have debt for the money. But *Fitzjames* thought, in this case, the property of the money was in the bailee till it vested in the bailor, by the non-performance of the trust. They said further, that if money was bailed to one to keep for the use of the bailor, and it was not contained in a bag or box, detainue would not lie, because the money could not be distinguished; but the party might have debt or accompt. They said, if plate was bailed to a person, and he altered it, the bailor might have either detainue or an action upon the case. They mentioned this to have been decided in the time of Edward IV. And in the time of *Frowike*, chief-justice, they said the following point was argued and ruled: A man bought twenty quarters of corn to be delivered at such a time and place; the vendor did not perform the contract, so that the vendee being a brewer, was obliged to buy corn elsewhere at a greater price. It was ruled, that the

vendee might have his action upon the case, and also debt, for the corn; but not detinue, because the property could not be known: so that they thought, in the present case, it was very reasonable that the plaintiff should have his option of two actions.

As to the bill, and the form of it, they said, that if it was in these words, "this bill witnesseth that *A.* borrowed "10*l.* of *B.*" without any thing more, this would charge the executors the same as an obligation, and the testator would not have been permitted to wage his law against it. Any memorandum of owing money, or of an accompt or an acknowledgment of a balance due, if sealed and delivered as a deed, would be a good obligation in law. Every man's deed was to be taken most strongly against himself.

They thought that, in this case, the plaintiff could not have accompt against the executors, because they were not privy to the transaction, and that debt was the proper remedy. They therefore affirmed the judgment; and an injunction which had been obtained in chancery was likewise dissolved; so that this matter was, in one shape or other, determined in three courts (*a*).

We have frequently observed, that in debt, detinue, and accompt, the defendant was allowed his law-wager in certain circumstances, but not in others. How this stood at present, and the manner of pleading in these actions, is worthy of notice; because we shall see afterwards that this consideration had great influence in settling the method of pleading in the new actions upon the case that were substituted in their stead. It was laid down, almost in the same way as the law had been understood for several years, that in detinue on a bailment by the hands of another, the defendant might wage his law, *because* he shall not answer to the bailment, but only to the detinue: the same in debt

(a) 23 Hen. VIII. *Dyer*, 29, 118.

upon a contract by the hands of another; though it would (a) be otherwise in accompt by the hands of another: and the reason they admitted this difference in accompt was, because the receipt might be traversed; from which we are to collect, that it could not in the two former actions (b). Again, *Fitzherbert* laid down this difference: where a man came to the possession of goods by bailment, and where by *trover* or finding. In the first case, he was chargeable by force of the bailment only; and if he bailed them over, or they were taken from him, yet he was still chargeable to his bailor by virtue of the bailment. But if he came to them by *trover*, he was only chargeable on his possession; and if he was lawfully out of possession of them before he who had right brought his action, he was not chargeable. For this reason, in *detinue* grounded upon a bailment, it would be a good plea for the defendant to say he found the goods and delivered them to J. S. before the action brought; and he might traverse the bailment. Though *Shelley* did not quite assent to this conclusion, yet he agreed with him that in many cases the bailment was traversable in *detinue*; and he added, that the *trover* also was traversable in some cases: but this was denied by *Fitzherbert* (c). On another occasion it was laid down by the same learned judge, that in accompt, on receipt by his own hands, even though a deed was shewn testifying the receipt, yet the defendant should be admitted to wage his law: the same in *detinue*; for notwithstanding the bailment was by deed, yet the *detinue* is the cause of action (d). To reconcile what is here said of *detinue* with what was laid down by *Fitzherbert* before, he must be supposed to mean here a bailment by the hands of another; and that this, though proved by a deed, might yet be discharged by wages of law, because he was, according to what is here said, only to answer to the *detinue*. These rules will be found to govern the

(a) Vid. ant. vol. III. 405.

(b) 18 Hen. VIII. 3.

(c) 27 Hen. VIII. 13.

(d) 27 Hen. VIII. 22.

pleading in the new actions upon the case, which have just been mentioned as coming in the place of detinue and debt.

The alterations made by statute in the criminal law during this reign were very many and very important: the determinations of the courts may be comprised in a smaller compass. There are some which are worthy of observation.

The principle which governed the parliament The criminal law. in the beginning of Edward III.'s reign (a), when they declared it unlawful to kill an outlaw, seems to have had no influence with that assembly in a similar case at this time. In 24 Hen. VIII. (b) it was agreed in parliament, that it was not felony to kill a man attainted in a præmunire; for, says the report, such a one is out of the king's protection, which is the same as if he was out of the realm and government of the king; though it would be otherwise of one attainted of felony.

A man was arraigned upon an indictment for Manslaughter. murder: upon the trial, the jury found him not guilty of the murder, but guilty of homicide or manslaughter; and the judgment given in the king's bench was, that he should be hanged. Another case of the same kind was determined in the same way by all the judges. The reason given by the report is, that manslaughter is comprehended in murder (c). From this one should be lead to conclude, that the precise meaning of murder, as distinguished from other killing, was not yet defined; nor indeed did there seem to be any direction by which a line could be drawn; till stat. 22 Hen. VIII. had taken away clergy from *murder with malice prepense*; the form of which expression seems to intimate that there might be a murder without malice prepense. It is certain that, after this act, murder was more exactly defined as to its legal import; though the distinction plainly marked out by this statute was not

(a) Vid. ant. vol. II.

(b) Stat. Geo. 197.

(c) Hen. Coron. 222.

observed by the courts for some time, as we shall again see in the reign of queen Mary.

If many persons were concerned in the commission of an unlawful act, and a murder was committed by one, all were construed to be principals in the fact. Thus, if twelve or more went to do a robbery, make a riot, affray, or the like, and one of them entered into a house and killed a man, the others were all principals in the murder. Such was the case of the Lord *Dacres*, who (together with *Mantel* and others) was executed, because one of the company killed a man as they were hunting together (a). It was held, that if a man was killed in jousting, or in play with sword and buckler, it was felony, notwithstanding it had been at the command of the king (b).

It had been agreed by the justices of both benches, that in an appeal of murder the defendant should not be permitted to plead that the deceased assaulted him, and that he killed him *se defendendo*; but should plead not guilty, and give the special circumstances in evidence; and if it appeared so to the jury, they should acquit him. Nor was he allowed to have this plea, with a traverse of the murder; for the matter of the plea was murder (says the book): murder could not be justified, and the traverse could not stand when the inducement to it failed (c). The way, therefore, was to plead the general issue. A question had arisen upon stat. 31 Hen. VIII. which made it high-treason to poison any one. A woman had poisoned her husband, and the heir brought an appeal of murder. It was contended, that the lesser offence was merged in the greater, and therefore that an appeal would not lie; and so it was held by the court (d).

Some questions arose on the nature of larceny. In the eighteenth year of the king, it was propounded by the chancellor to all the justices, whether if a man took pea-

(a) Keilw. 161. 34 Hen. VIII. Bro. Cor. 171.

(b) Bro. Cor. 222.

(c) New Cases, 21.

(d) 3d Hen. VIII. Dy. 80.4.

cocks, that were tame and domestic animals, it was felony. The opinion of *Fitzherbert* and *Englefield* was, that it was no felony; because they were *feræ naturæ* as much as doves in a dove-house; and if the young of such doves were taken, it was no felony. The same of herons taken out of the nest; of swans, bucks, hinds, which were domesticated; or hares taken out of a garden surrounded with a wall; the same of a mastiff, hound, or spaniel; or goshawk reclaimed; for they were more for pleasure than profit; which was the case with a peacock. They agreed, that fruit taken from a tree, or the cutting of trees or corn, was not felony; though it would be different, if they were before severed. However, *Fitzjames* and the other judges were of opinion, that peacocks were of the same nature with hens, capons, geese, or ducks, of which the owner had property, they having *animum revertendi*, unlike fowls of warren, as pheasants, partridges, and conies, of which it was clear no felony could be committed; so that it was at length agreed that felony might be committed of peacocks (a). A question arose upon the stat. 21 Hen. VIII. c. 7. concerning servants embezzling their masters' goods. It was asked, if a person delivered an obligation to his servant to receive the money due upon it, and the servant received and went away with it, converting it to his own use, whether this was within the meaning of the statute; and it was thought not, because no goods were delivered, an obligation not being a valuable thing, but a chose in action. And *Englefield* said, if a person delivered to his apprentice wares or merchandize to sell, and he sold them, and went away with the money, this was not within the statute; because he had the money by the delivery of his master, nor did he go away with the thing delivered to him. Yet if one of my servants delivers my goods to another of my servants, this shall be considered as my delivery; and if he goes off

(a) 18 Hen. VIII. 2.

with them, it is within the statute. And *Fitzherbert* seems to have doubted whether obligations might not be considered as goods within the act; for a gift of *omnia bona et catalla* would pass all obligations (a).

If the practice of justices of the peace was agreeable to what was laid down for law in our courts, they must have been of very little use in assisting towards bringing offenders to justice. Upon a justification under the warrant of a justice, in 14th of the king, it was said by *Fitzherbert*, that a justice of the peace could not make a warrant to take a man for felony, unless he was before indicted. *Brudnell*, the chief-justice, assented to this; but said he might make a warrant for keeping the peace. *Brooke* said, that the justice could not even take one for suspicion of felony, unless upon a suspicion of his own; much less could he make a warrant for that purpose. But they all agreed in holding the officer justified; for a justice being a judge of record, and having a seal of office, the bailiff was not to dispute his authority, but give obedience to the command of the warrant, and execute it (b). After all, it should seem that a warrant for the peace, which the judges here pronounced to be lawful, might, without any strained fiction, be issued against felons, and answer all the purpose of apprehending for felony.

Of trials in two counties. The old debate upon the locality of trial was not yet quieted. A man died in the county of Cambridge of a stroke he had received in another county, and the heir brought an appeal in the county of Cambridge. The court of king's bench were of opinion, that the jury should come from both counties, according to a case in the time of Henry VII. Upon this, it was observed by the clerks, that if a man died in London of a stroke received in Middlesex, the trial, according to common practice, was by a jury of Middlesex. The court said that

(a) 26 Hen. VIII. Dyer, 5. 2.

(b) 14 Hen. VIII. 16.

was a different case, because London and Middlesex could not join (a). In these cases no *nisi prius* used to be awarded, but the jurors of both counties were obliged to come up to the king's bench. A similar question had arisen, a few years before, on an appeal for a robbery. The robbery was laid in Wiltshire, and the procurement, and abetting in London: the appeal was brought in Wiltshire against the accessories, and it was objected to for that reason. After much argument on both sides, the opinion of the court was, that the appeal should abate. They laid it down as an established point of law, that where the tort commenced, there the action should be brought. They admitted, that where goods were taken feloniously in one county, and carried into another, the appeal might be in either, because the property was never divested out of the possessor; but it was otherwise where goods were so taken by a trespassor, for there the property was in the trespassor by the taking, and divested out of the owner; so that the action must be in the first county, where the trespass was alone committed. They put the case of a stroke in one county, and the death in another; but said, that in this case there could not be a trial in both counties, because those of London could not join with foreigners, as had been laid down in the former case (b). The offence of the accessory was therefore considered so separate and distinct from the other, that he was to be proceeded against where he committed his crime.

The above were instances of joining juries of different counties, where an appeal was brought, and the issue was to be tried. But we find it laid down, generally, that not only an appeal, but an indictment, might be brought in either county, where the goods were stolen in one county, and carried into another (c), upon the ground of its being a felony in both counties. The above case of the accessory, where a difficulty certainly remained, and the other points

(a) 32 Hen. VIII. Dyer, 46. 8.

(b) 39 Hen. VIII. 38. 50.

(c) 34 Hen. VIII. New Cases, p. 73.

of stealing and killing in two counties, which were not settled to the mind of every lawyer, occasioned an act in the next reign, which has directed how trials should be had in such cases in future.

The ecclesiastical court. While the king and parliament were engaged in destroying the Pope's authority, the jurisdiction and practice of the ecclesiastical court was not less questioned by all ranks of persons. The proceedings for heresy were carried on with such zeal as to be open to much odium, and the course in which those matters were conducted, was thereby more exposed to observation and censure. The branch of the ecclesiastical practice which was viewed with most jealousy, was the proceeding *ex officio*. This method of prosecution was considered by the common-lawyers in no better light than an abuse of all law and justice. It was, on the other hand, defended by the authority of prescription, and upon grounds of expediency. These topics were very fully discussed in print by persons of ability and eminence. The chief of those who entered into this controversy, were St. Jermyn, and Sir Thomas More; the former carrying on the attack, whilst the latter defended the established order of proceeding.

On the one hand, it was complained, that persons were brought before the spiritual judge for heresy, without knowing who had accused them; and were thereupon obliged, sometimes to abjure, sometimes to do penance, or pay great sums for redemption thereof; all which grievances were ascribed wholly to the judge and officers of the court, who were the only persons visible to the parties suffering. It was contended to be a heavy oppression, that a person brought *ex officio* before the ordinary, under suspicion of heresy, should be compelled to purge himself at the will of the ordinary, or be accused; which was, in a manner, inflicting a punishment without proof, or without an offence.

In answer to this it was urged, that if convening heretics *ex officio* was no longer to be practised, and no course

was to be taken but that of a formal accusation, it could not be expected that prosecutions should ever be made for heresy. Many, said they, will give secret information to a judge, who would not dare to stand forth as parties to accuse; and, if brought against their wills as witnesses, would readily enough give evidence: this might be observed not only in heresy, but in felonies, and other crimes. They adduced instances from the practice of the common law, equally hard on an innocent person, and similar with this proceeding. How often, says Sir Thomas More, do the judges upon suspicion award a writ to inquire of what fame and behaviour a man is in his country, who lies in the mean time in prison till the return? If he be returned good, that is, if he be in a manner purged, then he is delivered on paying his fees; if he is returned naught, then he is bound to his good abearing. The same where a man was indicted, and no evidence was given openly at the bar, as many times happened; for the indictors might have evidence given apart, or might have heard of the fact before they came there; and of whom they heard it, they were not bound to disclose, but rather to conceal, being sworn to keep the king's counsel, and their own. In such case, who is to tell the prisoner the names of his accusers, to intitle him to his writ of conspiracy? It is in vain to say that the indictors were his accusers, and them he knew, for he could have no redress against them for his undeserved vexation. And if it was said, that the proceeding of these twelve men, without open accusers, was less liable to exception than that of a single judge, the learned chancellor answers; that in his experience he never saw the day, but he would as well trust the truth of one judge, as of two juries. He thought it therefore a right conduct in judges, without any open information, but merely on general rumour, or secret intimation, to bind, as they frequently did, a troublesome man to his good abearing. And he says himself, that he,

while chancellor, had often put persons out of the commission of the peace on secret information.

Upon the whole, when it is considered that heresy was the first offence given in charge at every session of the peace and of gaol-delivery, and in every leet throughout the realm, and no prosecutions are there instituted, it seemed probable, that without some secret proceeding like that *ex officio*, the crime would go entirely without punishment (a).

Such were the arguments for and against this point of ecclesiastical jurisprudence, which, notwithstanding all opposition and animadversion, continued to maintain its ground.

King and government. Henry VIII. was a man of some learning, and discovered no small degree of industry on subjects where he had much interested himself: this appears by his book against Luther, of which it is generally agreed he was the author. He gave some attention to business. The preamble and material parts of the bill for empowering him to erect the new bishoprics, were drawn by the king himself; and the first draught of it is still extant in his own hand. There are likewise some minutes of his relative to the bishoprics he then had in contemplation to erect (b).

Through the whole of this prince's reign, he seems to have enjoyed the full gratification of his absolute will and caprice. A concurrence of events had produced a state of things which enabled him, beyond the example of any of his predecessors, to tyrannize over all ranks of men, and over the laws themselves; or, when that was not safe, to cause such laws to be made as would warrant and legitimate every act of power.

Though the parliaments of this king were obedient to his commands in most points, yet in the article of taxation he sometimes met with disappointment. In consideration,

(a) Sir Tho. More's Works, 907. 995. 1012.

(b) Burn. Ref. vol. I. 258.

perhaps, of their numberless other compliances, the king endured this with patience; never failing to try all means of keeping on good terms with an assembly which he was generally able to make the instrument of his designs.

In the 14th year of his reign he issued privy-seals, demanding loans. He carried this scheme of arbitrary taxation still further; he published an edict for a general tax, which, however, he still called a loan; and under that pretence levied 5s. in the pound on the clergy, and 2s. on the laity. In the same year, when a parliament had been called, and they had made him a grant payable in four years, he would not content himself with the terms the legislature had prescribed, but levied the whole in one year (a).

Not content with this, about two years after, he issued commissions into every county, for levying 4s. on the clergy, and 3s. 4d. on the laity. But finding some resistance to this attempt, he thought it advisable to send letters to every county, declaring that he meant no force by this imposition, and that he would take nothing but by way of *benevolence*. Mean while the courtiers ventured to contend, that the statute of Richard III. against benevolences, as it was made by an usurper and a factious parliament, could not bind an absolute monarch, who held his throne by hereditary right. The judges went so far as to affirm, that the king might exact by commission any sum he pleased (b).

When doctrines like these were propagated from authority, the king was encouraged in renewing at different times these arbitrary taxes. The house of commons were so far from remonstrating, that they twice passed acts for the remission of debts which the king had contracted by these loans; in the last of which they inserted a clause, requiring that such as had already obtained payment, in the whole or in part, should refund to the exchequer (c).

(a) Hum. vol. IV. 46. 48.

(b) Ibid. 61.

(c) Ibid. 243.

Notwithstanding this injustice, he succeeded the same year in soliciting new loans. Besides this, he enhanced the price of gold and silver, under pretence that it should not be exported; he coined base money; and appointed commissioners to levy a benevolence, which was by no means unfruitful. An alderman of London, not contributing according to the expectations of the commissioners, was enrolled as a foot-soldier for the Scottish war; others were imprisoned: so that the king, by his prerogative, exercised an absolute controul over the persons and property of all his subjects (*a*).

All this was owing to the tameness or ignorance of parliament: overawed by the firmness of Henry, unacquainted with the extent of their privileges, and the principles of the constitution, they were unable to afford the people any protection. The following is an instance how little notion they had of a legal government. The duty of tonnage and poundage had been voted to former kings for life; but Henry levied it six years without any renewal of that grant to himself: and though four parliaments had sat during that time, none of them complained of this as an infringement; on the contrary, when they passed stat. 6 Hen. VIII. c. 14. to give this tax to the king for life, they complain that he had sustained losses by those who had *defrauded* him of it (*b*).

In the same way must we account for that extraordinary statute, by which the parliament ordained, that the king's proclamations should have the force of laws (*c*). To secure the execution of this act, another (*d*) was afterwards made, appointing that any nine counsellors should form a legal court for punishing all disobedience to proclamations. By these two statutes the king was, in effect, made absolute, and maintained in his own person completely the legislative and executive power of the state.

(*a*) Hum. vol. IV. 246. (*b*) Ibid. 272. (*c*) Stat. 31 Hen. VIII. c. 8.

(*d*) Stat. 34 Hen. VIII. c. 23.

The authority given by stat. 28 Hen. VIII. c. 17. may be reckoned among the singular aggrandizements of royal authority in this reign. That statute enabled any one inheritable to the crown, as limited by Henry VIII. to repeal, after his age of twenty-four years, all statutes to which he had consented before that age.

This reign affords many instances of extraordinary power exercised as well by subjects as by the king. In the 9th year of his reign, the king procured from the Pope the legatine commission for Wolsey, with the power of visiting all the clergy and monasteries, and that of suspending all the laws of the church during a twelvemonth (a). This was a great authority; and Wolsey, to secure the execution of it, established an office, which he called the *Legatine Court*. This new court exercised certain censorial powers, not only over the clergy, but also over the laity. It inquired into matters of conscience; into causes of public scandal; into conduct, which, though out of the reach of the law, was contrary to sound morals. The cardinal went further, and assumed the jurisdiction of all the bishops' courts, particularly that over wills and testaments; he also presented to priories and benefices, disregarding all rights, whether of election or patronage.

The courts of law gave the first blow to these great powers. *Allen*, an instrument of the cardinal, who used to sit as judge in this court, was convicted of malversation; and the legate thenceforward thought proper to be more cautious in displaying his judicial authority.

The new appointment of *Vicar-General*, conferred on Cromwell some years after, delegated to that officer the king's whole authority over the church, as supreme head thereof. This, though not so extensive as that exercised by Wolsey, and in the hands too of a more discreet man, was yet a very eminent station; and being created for the

(a) *Haml. vol. IV. 15.*

purpose of making rigorous inquisition into the state of the religious houses, gave Cromwell an unlimited sway. At one time he published, in the king's name, an ordinance, retrenching many gainful superstitions, abrogating many of the popish holidays, ordering incumbents of parish-churches to set apart a considerable portion of their incomes for repairs, for maintaining exhibitioners at the university, and the poor (a); all which he did without the sanction of parliament or convocation.

As if every consideration and every article of life was to depend on arbitrary will, the king had appointed a commission, consisting of two archbishops, several bishops, and some doctors of divinity, to chuse, among the variety of tenets then promiscuously held, a form of religion for the kingdom. These commissioners had not made much progress in their undertaking, when the parliament, in 1541, made an act, ratifying all the opinions which they should *thereafter agree upon with the king's assent*; provided only, that they established nothing contrary to the laws and statutes of the realm (b).

If Henry was regardless of law in elevating and maintaining his ministers in extraordinary authority, he was equally void of justice in animadverting on them. Wolsey, by exercising his legatine authority, had incurred the statute of *præmunire*. Though this was by the procurement of the king himself, and had been acquiesced in by the parliament and nation for some years, he did not scruple to suffer a sentence of *præmunire* to pass on the cardinal; but executed part of it very readily, almost in person, by taking possession of his immense property in houses, furniture, and other valuables (c). The king went further: he pretended the whole church had incurred the same penalty, by submitting to this papal authority; and the attorney-general had begun to proceed against them formally by indict-

(a) *Hum.* vol. IV. 170.(b) *Ibid.* 222.(c) *Ibid.* 94.

ment. To avert the king's resentment, they voted him a great sum of money, made *their humble submission* to him, acknowledged him to be the protector and supreme head of the church and clergy of England; and for these condescensions obtained a pardon (a).

The house of commons now grew apprehensive that they also should be obliged to purchase a pardon for their submission to the legatine authority. They therefore petitioned the king for a remission of this offence to his lay subjects; and some time after a general pardon was issued for all the laity (b).

Thus did the king himself encourage and promote a breach of the law; and afterwards turn the delinquency of his subjects to his own emolument.

Henry was not contented with this sovereign dominion over law and justice; he attempted to govern impossibilities, and reconcile the plainest absurdities, by means of the omnipotence of parliament. It being thought proper to make some alteration in the oath against the Pope's authority, certain oaths were devised, more comprehensive and precise, to be taken in future; and by the same stat. 35 Hen. VIII. c. 1. it is provided, that they who have already sworn the former oaths, or any of them, *shall take and esteem it of the same effect and force* as though they had sworn this: thus the taking of one oath is made by act of parliament equivalent to the taking of another. In the second act of succession, stat. 28 Hen. VIII. c. 7. sect. 24. there is a repeal of the former act of succession; and the oath taken under it was now to be dispensed with; the following words were therefore added to the new oath: "*And in case any other oath be made, or hath been made by you to any person, that then ye are to repute the same as vain and annihilate.*" The like clause was added to the oath in which the Pope's authority was renounced, which was or-

(a) Hum. vol. IV. 106.

(b) Ibid. 107.

dained by stat. 28 Hen. VIII. c. 10. and the like was inserted in the second oath above alluded to, for renouncing the Pope's authority.

If we are to judge of the general administration of criminal law in this reign, from the trials that have come down to us of eminent persons, it appears that the lives of the people were entirely in the hands of the crown. A trial seems to have been nothing more than a formal method of signifying the will of the prince, and of displaying his power to gratify it. The late new-invented treasons, as they were large in their conception, and of an insidious import, by giving a scope to the unbridled mode of inquiry then practised, enlarged the powers of oppression beyond all bounds.

The case of Sir Thomas More is a strong instance how little anxiety there was to establish a capital charge by plausible proofs, and the little probability there could be of escaping conviction. It had been made treason to endeavour to deprive the King of his titles: the title of Head of the Church had been conferred on him by parliament; so that a denial of that title was treason under the new statute. After an imprisonment of near fifteen months, Sir Thomas was brought to a trial for this offence. The indictment was so long, and charged such a variety of matter, he said, he could not remember a third part of what was objected against him. They then proceeded to proofs. His examination in the Tower by certain lords, was considered as evidence sufficient to support the charge; though it amounted to nothing more than a refusal to answer or discuss such questions as concerned the King's or Pope's supremacy: nor was it till after he had entered on his defence, that Mr. Rich (afterwards Lord Rich) and some others were examined *videlicet*. Upon such evidence he was convicted, to the entire satisfaction of the chancellor, who presided; and who emphatically expressed his appro-

bation of the verdict in the words of the famous Jewish magistrate, *Quid adhuc desideramus testimonium, reus est mortis* (a).

The only charge against Anna Boleyn which was supported with the least degree of proof, was, "that she had affirmed to her minions, that the king never had her heart; and that she had said to each of them apart, that she loved him better than any person whatsoever." This was held a *slandering of the king's issue begotten between the king and her*; one of the new-made treasons, and, what is very remarkable, designed originally for the protection of her own character, and of that of her progeny (b).

Lord Surrey was indicted of treason. We are ignorant what was the tenor of the indictment; but the evidence against him was, that he entertained some Italians in his house, who were suspected to be spies; that a servant of his had made a visit to cardinal Pole, in Italy; and that he had also quartered the arms of Edward the Confessor; one of which was thought sufficient evidence of his keeping up a correspondence with that obnoxious prelate; the other was judged an indication of his aspiring to the crown; though he and his ancestors, during the course of many years, had done the same, and were justified in it by the authority of the heralds. Such were the facts upon which this accomplished nobleman was convicted by a jury, and was accordingly executed (c).

In the criminal prosecutions of these times, there are two things worthy of observation: first, the slight facts which were considered as proofs of a charge; secondly, the slight evidence which was allowed to establish those facts: an observation which may be made as well upon proceedings at common law, as upon the more decisive way of condemning persons in parliament.

The favourite way of proceeding against state criminals was by bill of attainder. This extra-
Bills of attainder.

(a) Stat. Tri. vol. I.

(b) Hum. vol. IV. 189.

(c) Ibid. 214.

ordinary judgment was resorted to according to the occasion; either to confirm a sentence already passed in some court of law, or to ensure the destruction of such as might possibly escape by the openness of a common-law trial. Thus the sentence against Empson and Dudley, upon a flimsy charge of treason, was confirmed by bill of attainder; as was that against the marquis of Exeter, the lords Montacute, Darcy, Hussy, and others, who had all been formally tried. These, as they succeeded a regular trial and condemnation at law, were not so exceptionable as the attainders of Sir Thomas More and bishop Fisher for misprision of treason; which, perhaps because a case that did not extend to life, they ventured on without the examination of witnesses, or hearing them in their defence. On the other hand, in a capital case, the Maid of Kent and her accomplices were all examined in the star-chamber, though not in parliament, before the bill of attainder passed upon them (a). This examination of witnesses in the star-chamber was probably in order to try the strength of the evidence, and to determine in what way to proceed; though we do not find, that the result of such examination was always laid before parliament to enable them to form a judgment on the propriety of that to which they were called upon to assent. The privy-counsellors had taken their resolution; and if they were satisfied, the houses seldom concerned themselves as to any further inquiry.

The attainders in parliament which we have hitherto mentioned, were carried through with moderation and justice, compared with those which followed. In the 29th year of his reign, Henry introduced a new practice of attainting persons. The countess of Salisbury had become extremely obnoxious to him, on account of her son, cardinal Pole; and nothing was more desired by Henry than to take her off. Various accusations were framed against her; that she hindered the reading of the new tran-

(a) Burn. Ref. vol. i. 146.

slation among her tenants ; that she procured bulls from Rome, which were said to be found in her house ; and that she kept up a treasonable correspondence with her son. These charges, however, could not be sufficiently proved, might be invalidated by her, or would not reach her life. This determined the king to procure her destruction in a more decisive and summary way than had been hitherto used. For that purpose he sent Cromwell to consult the judges, whether the parliament could attain persons who were forthcoming, without trial, or citing them to appear and defend themselves (a). The judges answered, that it was a dangerous question ; that the high court of parliament ought to give the example to inferior courts of proceeding according to justice ; no inferior court could act in that arbitrary manner, and they thought the parliament never would. But being required to give a more explicit answer, they said, that if a person was attainted in that manner, the attainder could never afterwards be brought in question, but must remain good in law. . As Henry did not want his judges to determine how just, but only how effectual this proceeding, so conducted, would be ; he was satisfied with their answer, and resolved to avail himself of it against the countess.

A bill was brought into the house of lords to attain her of treason. The only thing like proof before the parliament was, that Cromwell shewed to the house a banner, on one side of which were embroidered the five wounds of Christ, the symbol chosen by the northern rebels ; on the other side, the arms of England ; which banner he said was found in the house of the countess. This was considered as an evidence of her approving that rebellion.

Fifteen others were attainted in the same act ; some of them, who were friars, for saying, “ that venomous “ serpent the bishop of Rome was supreme head of the “ church of England ;” others for treason in general, no

(a) Ham. vol. IV. 198.

particular fact being specified. There is no appearance that witnesses were examined against any of them; if they were, it probably passed in the star-chamber, for none are mentioned in the Journals. The haste with which this famous bill passed, is not, of all circumstances attending it, the least remarkable; it was brought in the 10th of May, was read that day the first and second time, and the third next day. In the same year, the abbots of Reading, Colchester, and Glastenbury, were in like manner attainted of treason by bill (a).

After the precedent had been introduced, they went on through the whole of this reign attainting persons in a summary general way; the number of which attainders it would be tedious and disgusting to recount (b). The most striking instance of these was, when this engine of tyranny was directed against the man who, from his devoted attachment to Henry, first brought it into use. Cromwell, in the next year, was attainted by bill, without trial, examination, or evidence. The duke of Norfolk was, in the latter end of this reign, attainted in the like manner.

Numerous as were the attainders for treason, both by bill and by common-law proceedings, these did not shed so much blood as condemnations for heresy. The kind of execution for this offence is in itself so horrible, and such scenes were so often repeated, that it would be irksome, as well as beside the purpose of this work, to do any thing more than just allude to them. The statutes lately made respecting religion and the king's supremacy, had laid so many snares both for protestants and Romanists, that death seemed to present itself on all sides. The miserable condition of the people can hardly be better described than in the observation of a foreigner at that time, who remarked, "that those who were against the pope were burnt, and "those who were for him were hanged."

(a) Burn. Ref. vol. I. 342.

(b) Ibid. 342, where many are mentioned.

It is more to our purpose to observe, that among the pains inflicted on the unhappy sufferers for religion, there are two remarkable instances where *torture* was used. We are told, that the elegant and good Sir Thomas More was so inflamed with religious bigotry, as to send for to his own house a Mr. Bainham, a gentleman of the Temple, who favoured the new opinions; and because he refused to discover others who agreed with him in his religious sentiments, the chancellor ordered him to be whipped in his presence; he afterwards sent him to the Tower, and there he himself saw him put to the torture (a).

Torture.

It is also related (b), that the chancellor Wriothesley, having examined Anne Ascue with regard to the patrons she had at court, and she refusing to betray them, he ordered her to be put to the torture, which was executed in a very barbarous manner: he stood by while it was performing, and ordered the lieutenant of the Tower to stretch the rack farther: but he refused, notwithstanding the chancellor's menaces; who, upon that, put his own hands to the rack, and stretched it so violently, that he almost drew her body asunder (c).

Long and barbarous imprisonment was among the sufferings of unhappy delinquents. We are told that the aged prelate bishop Fisher, being stripped of his bishopric and every species of property, was confined in prison above a twelvemonth, with scarcely rags enough to cover his nakedness (d).

We shall now consider the legal documents of this reign; the first of which are the statutes. Of the statutes.

The statutes began in this reign to assume a different appearance from that which they had before borne, but such as they have continued in ever since. This difference consisted as well in the language and style, as in the form of

(a) Hum. vol. IV. 132.
IV. 158.

(b) Fox, vol. II. 578.

(c) Hum. vol.

(d) Ibid. 132.

them. We have before seen, that all the acts of one session were strung together as chapters of one statute, with one general title prefixed to the whole; but in the fifth year of this king it first became the custom to put a distinct title to every particular chapter of the statute (a).

A remarkable circumstance of the statutes of Hen. VIII. is, the prodigious length to which they run. The first of these long statutes is stat. 21 Hen. VIII. c. 5. concerning the probate of wills; and from that period, the legislature seem invariably to have indulged themselves in the same prolixity. To this they were perhaps tempted by the subjects which came under their consideration, and which required very multifarious provisions; such as the reformation, the succession, the poor laws, the revenue, and other matters. Whatever was the object of parliamentary regulation, was still treated with the same abundance of provisions and profusion of words. The great motive to this new manner of drawing statutes, seems to have been an extreme anxiety, that the meaning of the parliament should be intelligible and clear, beyond all possibility of question or cavil. To effect this, an act was stuffed with numerous clauses; and the whole compass of language was ransacked for expressions to define and fix the precise intention of each.

An act was generally introduced with a long and emphatical preamble, opening the occasion and object of it, by enumerating the evils and their proposed remedies. These preambles, though before in use, were now much fuller than formerly. The enacting clause was conceived with a view to cover every possible case; and by a series of expressions, of a similar or synonymous import, to obviate every pretence to elude it. Lest this should not completely attain the aim of the parliament, several provisos, qualifi-

(a) Hum. vol. IV. 130.

cations, and exceptions were added, to mark out distinctly the direction the act should take.

As this considerably increased the length of statutes, it also rendered them verbose, perplexed, and tedious. The sense, involved in repetitions, is pursued with pain, and almost escapes the reader; while he is retarded, and made giddy by a continual recurrence of the same form of words in the same endless period (a). This solicitude to ensure their meaning has in some instances carried the parliament so far, as to heap one proviso upon another, and sometimes to insert the same clause twice over (b). Not content with the aid derived from a multiplicity of words, and from repetitions, to prevent misconstructions, the parliament in one statute, upon a subject of a delicate nature, added the following remarkable clause: "And be it finally enacted, by the authority aforesaid, That the present act, and every clause, article, and sentence comprised in the same, shall be taken and accepted *according to the plain words and sentences therein contained*, and shall not be interpreted nor expounded by colour of any pretence or cause, or by any subtle arguments, inventions, or reasons, to the hindrance, disturbance, or derogation of this act, or any part thereof; any thing or things, act or acts of parliament heretofore made, or hereafter to be had, done, or made, to the contrary thereof, notwithstanding: and that every act, statute, law, provision, thing and things, heretofore had or made, or hereafter to be had, done, or made, contrary to the effect of this statute, shall be void, and of no value nor force (c):" a clause, which is, at once, an instance of the concern and jealousy felt by the parliament on this subject, and an example of that legislative language which we have been just remarking.

That this wordy style is of use in subjects which require

(a) Vid. a strong instance of this in s. 17 of stat. 25 Hen. VIII. c. 21.

(b) Vid. sect. 8 and 34 of stat. 21 Hen. VIII. c. 13. and sect. 91 and 123 of stat. 34 and 35 Hen. VIII. c. 26.

(c) Stat. 28 Hen. VIII. c. 7. sect. 28.

legal precision, is evinced, from its being adopted much about the same time in deeds of conveyance; where we find the like tediousness of phraseology, and a similar multiplicity of covenants and provisos. The same peculiarity of language has continued ever since in both.

With all this precision in wording the contents of an act, they seemed to pay no attention to the title, but to abandon that to chance or ignorance to prefix; the title seldom conveying any idea of the design or contents of the statute, and often being grossly incorrect.

The Reports of this reign are contained in the *Fear-Books*, and in *Dyer*; with some scattered cases in *Keilway*, *Jenkins*, *Moore*, and *Benloe*; and towards the end of the reign in *Leonard*. The Year-Book is a very

scanty one; compared with those which went before; owing, probably, to persons being no longer encouraged with a stated appointment to execute this task. It contains only the 12th, 13th, 14th, 18th, 19th, 26th, and 27th years; and there ends this famous collection of Reports called the Year-books.

Perhaps, since a taste for all kinds of learning had begun to prevail, the opinion of this establishment of reporters was altered, and it was thought more advisable to trust to the general inclination discovered in private persons to take notes; who, probably, from a competition, would do more towards rendering this department perfect and useful, than any temptation from a fixed salary: whatever might be the reason, such a stipend was no longer continued, and the undertaking dropped.

However, we find no want of reporters. These began now to multiply; and very soon, if not in this reign, furnished, all together, a greater variety of cases than used to be taken on the former plan. As there would thenceforward have been no reports, if gentlemen in the profession had not made them, either for their own use or with design to publish, a certain diligence and attention began to

be paid to this new exercise of ability ; and the business of reporting opened a new field to the studious for the display of accuracy, judgment, and learning. From this period, there will be seen to follow a train of writers of this kind, of various characters and merit, to whom we are obliged for carrying on the written annals of the law down to the present time. There is one thing common to all those of this period, that they followed the language in which their predecessors had written, and published their reports in the Law-French.

The law received great improvement from the many treatises and useful collections published in this reign. These, by digesting the learning of the law, at once gave a polish to the rude materials furnished by former ages, and rendered the knowledge of them more easily attainable. The publications of this reign may be divided into such as were produced by writers of this period, and such as were written in former reigns, and were now for the first time put to the press. We shall pursue these two classes of publications according to the course of time, that the progress made in improving the stock of legal learning may be distinctly perceived. Every addition in these times to the lawyer's library is an object of curiosity.

The most distinguished writer upon law in this reign, is *Anthony Fitzherbert*, first a serjeant, and some years after a judge of the common-pleas. The first book published by this learned author was his *Grand Abridgment*, printed in 1514 by Richard Pynson (a). So useful a work soon required another supply. In 1516 a second edition was printed by Wynkyn de Worde, or perhaps this is one of the books that were

(a) It is collected from John Rastell's preface to the *Liber Assisarum et Placitorum Corone*, that he had some hand in the publication of this Abridgment. It was printed in three volumes, in folio; and the price of it, and of the next edition in 1546, was forty shillings.

printed for him abroad, where the Law-French was better understood, and where, for that reason, many of our law-books used to be printed (a). In 1534 he published his new *Natura Brevium*, which was reprinted in 1537 (b). Several books were printed in this reign on the office and duty of a justice of peace. The first was in 1515, in which year we find two works printed by different printers under the title of *The Boke of Justices of Peas* (c). In 1534 there appeared another work, intituled, "*The Boke for a Justyce of Peace never so well and diligently set forth.*" All these were without any name. Afterwards, in 1541, we find "*The New Booke of Justyces of Peace, made by Anthony Fitzherbert, Judge, lately translated out of Frenche into Englishe* (d). These are all the writings that are known to belong to Fitzherbert upon the law of England: several anonymous tracts, which will be mentioned in their proper places, have been attributed to him, though upon no sufficient authority.

Saint Germain is an author who gained considerable note in this reign, by his famous book intituled, "*Doctor and Student.*" The first dialogue of this work came out in 1518, in Latin, with the following title, *Dialogus de Fundamentis Legum Angliæ et de Conscientiâ*. The second dialogue was printed in English in 1530; and the next year there appeared a translation of the first dialogue. Both afterwards passed several editions, under the title of *Doctor and Student* (e). This author's writings upon the comparative rights of the ecclesiastical and temporal powers will be mentioned in another place.

Of the foregoing performances, the *Abridgment* and *Natura Brevium* of Fitzherbert, and the *Doctor and Student*, are the most distinguished. The *Abridgment* is a work of singular learning and utility. If the date of Statham's

(a) Typog. Antiq. 260. 154. (b) Ibid. 423. 429. (c) Ibid. 152. 346.

(d) Ibid. 554. (e) Ibid. 333. 379.

publication could be ascertained to be antecedent to this, many reflections might be founded on the comparative excellence of the present work : it might then be said to be formed on that of Statham ; that Statham's was the common-place book of the time, and as such furnished a basis, on which the superstructure of Fitzherbert's more enlarged and improved work was raised ; that the experience of a few years pointed out the defects of the former, and enabled Fitzherbert to make the necessary corrections. The foundation for these observations being very uncertain, we can only remark, that the latter work is five times the size of the former ; that it contains the cases as low down as the time of its publication ; that these are abstracted more fully, and convey the sense of the book more satisfactorily : otherwise, the order of Statham's work in the titles seems to be followed, and the cases seem to be arranged with the same disregard to method and connexion. This Abridgment was a valuable acquisition to the lawyers of this period, but was superseded by the Abridgment of Sir Robert Brooke in after-times : the latter abridger had the advantage of his predecessor, in possessing many year-books which he had never seen. The original cases, on the other hand, of the reigns of Richard II. Edward II. Edward I. and Henry III. which are to be found only in Fitzherbert, preserve to this work a reputation entirely its own. Several in other reigns, and particularly about his own time, are not taken from any book we have ; so that Fitzherbert's, though in general an abridgment, is also in many parts an original work.

Fitzherbert's *Natura Brevium*, like his other performance, is an improvement of a more ancient work of the same nature and title. It is remarkable, that this treatise on the nature and effect of the principal writs in the Register, was published at a time when those writs were, many of them, going into disuse, and soon afterwards became obsolete ; so that hardly nine parts in ten of this work make a portion of our present law.

The form and style of these two works have all the dryness of professional treatises. The *Doctor and Student* is a production of a different cast: it consists of two dialogues between a doctor of divinity and a student of the common law. These contain discussions on the grounds of our law; and where objections had been stated to some of its rules and maxims, it is endeavoured to reconcile them with reason and good conscience. The whole is treated in a popular way, with the freedom and language of conversation, conveying, by means of objections and their answers, not an unsatisfactory account of many principles and points of the common law.

Rastell. Among the law writers of this reign are to be reckoned *John Rastell*, the printer and lawyer, and his son *William Rastell*, the lawyer and printer: the former was bred a printer, and though he did not take to the practice of the law, yet it evidently appears from his works, that he had been a diligent student; the latter, though educated for the bar, and a practitioner, succeeded to his father's occupation, which he seems to have united with his profession, till the honours of the latter at length called upon him to decline it altogether. John Rastell translated from the French the *Abridgment of the Statutes* prior to the time of Henry VII. mentioned before (a). He also abridged those of Henry VII. and down to the 23d and 24th of this reign, which were printed together by the son William in 1533. This was the first *Abridgment* in the English language; and it is introduced by the author with a long preface recommending the printing of law-books in English; and ascribing great praise to Henry VII. for first directing the statutes to be made in the mother-tongue. To this writer are ascribed two other books, *Les Termes de la Ley*, and *The Tables to Fitzherbert's Abridgment*. The title of authorship has, however, been disputed with respect to these two works, which have by some been given

(a) Vid. ant. 120.

to the son William. As to *Les Termes de la Ley*, it was ascribed to John by Bale; but it is omitted by Pitts in his account of him, and peremptorily denied to be his by Wood, who as positively attributes it to William: That was Lord Coke's opinion; but bishop Tanner again restores it to John. Perhaps it may be giving to each his distinct merit, if we suppose that John composed the original work in French, and that William made the translation, which was printed by him, and was never doubted to be his (a).

The tables to Fitzherbert's Abridgment were first printed in 1517; the translation of the Abridgment of the Statutes in 1519, and again in 1527; *Les Termes de la Ley* (b), in 1527 (c).

To William Rastell is ascribed a tract called *The Char-tulary*, printed in 1534; but there seems no pretence for this supposition, and the work is no more than the tract which had before been printed under the title of *Carta Fædi simplicis*. How far he was author of the *Termes de la Ley*, has just been considered. He made a table to Fitzherbert's *New Natura Brevium*, and another of the pleas of the crown. The tables to Fitzherbert's Abridgment, which are ascribed by some to him, are the same probably that were before made by his father, and were reprinted by

(a) According to Wood, William was but nineteen years old, and only two years standing in the university, when this book was first printed. It is remarkable, that in the reprint of the proem prefixed to the translation, William introduces a sentence, that was not in the first edition, expressing that he first wrote that book in French, and then translated it into English. If the above date is correct, the assertion of William may perhaps be suspected. Typ. Antiq. 331.

(b) This was the title given to the work by William; but when first published by John, it bore the following title: *Expositiones Terminorum Legum Anglorum, et Natura Brevium, cum diversis Casibus, Regulis, et Fundamentis Legum tam de Libris Magistri Littletoni quam de aliis Legum Libris collectis, et breviter compilatis pro Juvenibus valde necessariis*; but, though the title was in Latin, the work was in French. Typ. Antiq. 331. 474.

(c) Typ. Antiq. 326, &c.

William. The performances, therefore, which most distinguish William Rastell, belong to a later period than this reign: these are his *Collection of English Statutes*, printed in 1559; and his *Entries*, printed long after his death, in 1596 (a).

As valuable a performance as any, perhaps, of this reign, is Perkyns's *profitable boke* on the learning of conveyancing. This was first printed in 1532, with the following title: *Incipit perutilis Tractatus Magistri Jo. Parkins interioris Templi Socii, &c.* This book is in French (b).

Besides the writings of the above authors, several books made their appearance in this reign without a name, or any intimation to what name they belonged; though some of them have been ascribed to certain of the writers already mentioned. The earliest of these anonymous publications is the *Intrationum Liber*, which was printed by Pynson in 1510 (c). In 1516 were published by the same printer, the book called *Modus tenendi Curiam Baronis cum Visu Franciplegii*, the *Retorna Brevium*, the *Modus tenendi unum Hundredum, sive Curiam de Recordo* (d), in 1525, the *Diversite de Courtz et lour Jurisdictiones et alia necessaria et utilia*, attributed by some to Fitzherbert; and the *Articuli ad Narrationes Novas partim formati*. In the year 1527 was printed the book usually called *Carta Fædi*: the title of it was, *Parvus Libellus continens Formam multarum Rerum*; and then, *Carta Fædi simplicis cum Literâ attornatoriâ* is the head-title of the first article in the book, and so gave it afterwards that name. This is a book of precedents of feoffments, releases, and other conveyances, and was frequently reprinted in this reign, sometimes under the title of *The*

(a) Typ. Antiq. 473, 474.

(b) Lord Coke has been very incorrect in assigning the date of several of the early printed works on our law; but he is unusually so, when speaking of this, he says, "Perkins, a little treatise of certain titles of the common laws, wittily and learnedly composed and published in the reign of king Edward the Sixth." Pref. to 10 R.-p. Typ. Antiq. 390.

(c) Typ. Antiq. 255.

(d) Ibid. 260.

Chartulary, and by some is attributed to William Rastell (a). In 1540, there came out a book intituled, *The principal Laws and Customs and Statutes of England which be at this present day in use* (b). In 1543, there appeared a book upon the office of sheriffs, bailiffs of liberties, escheators, constables, and coroners (c). At the close of this reign, in 1546, there appeared *A Booke of Presidentes, exactly written in maner of a Register, and shewing howe to make al maner of Evidences and Instrumentes*. And of the same date (d), another intituled, *Institutions or principal Grounds of the Laws and Statutes of England* (e): and another, in 1547, under the title of *The Attorney's Academy* (f).

Most of the foregoing works were repeatedly printed by different printers in the course of this reign, and many of them were translated into English. Some of them were collected and published together. We find, in 1534, the following pieces were published by Rastell, in one quarto volume: *Natura Brevium*, the Olde Tenures, Littleton's Tenures, the New Talys, the Articles upon the New Talys, Diversitie of Courtes, Justice of Peace, the Chartulary, Court Baron, Court of Hundrede, *Retorna Brevium*, the Ordynauce for takynge of Fees in the Exchequer. In his preface to this publication, addressed to the students of the law, he says, that persons begun to study the law with reading *Natura Brevium*, the Old Tenures, and Littleton's Tenures (g).

In the year 1544 another collection was printed by Berthelet, containing, the boke for a Justice of Peace, the boke that teacheth to keepe a Court Baron or a Lete, the boke teaching to keep a Court Hundred, the boke called *Retorna Brevium*, the boke called *Carta Fædi*, and the

(a) Typ. Antiq. 387, 388, 447, 481. (b) Ibid. 408. (c) Ibid. 555.
(d) Ibid. 521. (e) Ibid. 708. (f) Ibid. 874.

(g) His words are, "Lyke as a chylde goynge to scole, fyrste lerneth his letters out of the abc, so they that entende the study of the law do fyrste study these." Typ. Antiq. 481.

boke of the Ordinaunce to be observed by the Officers of the King's Eschecker for fees-taking. This ordinance for regulating fees in the exchequer was made in the time of Henry VI. (a) To these productions of this reign may be added two pieces that have lately been brought to light: one intituled, "A Replication of a Serjaunte at the Lawes of England to certayne Pointes alleaged by a Student of the said Lawes of England, in a Dialogue in Englishe between a Doctor of Divinity and the said Student;" the other, "A litle Treatise concerning Writs of Sub-pœna." The latter is thought to be written by St. Germyn, in vindication of the passages in his Doctor and Student that had been attacked by the supposed Serjeant in the former tract (b).

Some publications of this period, on the controversies about religion, may, from the incidental discussion of certain points of ecclesiastical jurisprudence, be reckoned in the class of law-books. Such was "A Treatise concerning the Division between the Spirituality and Temporality;" which was also printed under the title of "The Pacifier of the Division between the Temporality and Spirituality." This is attributed to St. Germyn; and the principal part of Sir Thomas More's Apology is levelled at this work. To this St. Germyn replied, in another tract intituled, "*Salem and Bizance*; a Dialogue betwixte two Englishe Men, whereof one was called Salem, and the other Bizance," which occasioned Sir Thomas More's "*Debellacyon of Salem and Bizance*." The two last works were printed in 1553 (c). To these may be added other treatises, the authors of which are not known: "A Treatise concerning divers of the Constitutions provincial and legatine;" "A Treatise concerning the Power of the Clergy and the Laws of the Realm;" both printed by Godfrey. "The

(a) Typ. Antiq. 447, 448.

(b) These two pieces are now printed for the first time in Mr. Hargrave's first volume of Law Tracts.

(c) Typ. Ant. vol. I. 402. 421. 478.

“ true Difference between the Regal Power and the Ecclesiastical Power (a).” “ The Liberties of the Clergy collected out of the Laws of the Realm, by John Goodall.” “ A Dialogue between a Knight and a Clerk on Power spiritual and temporal (b).” We find also a translation of the Constitutions provincial and legatine, printed in 1534.

Next to the performances of writers, those of ^{Printing of} printers are to be reckoned among the helps to ^{law-books.} the study of the law. At the opening of this reign, Pynson was continued in the appointment of king's printer, and he was succeeded by Thomas Berthelet, in 1529. Berthelet was the first who had this office granted to him by patent: the grant was for life, and he kept it during the whole of this reign (c). The printing of law-books lay principally with these printers, with John and William Rastell, and with Robert Redman; all of whom printed the statutes, and various law-treatises, over and over again.

It is unnecessary to enumerate the several collections of the statutes at large that were printed in this reign (d); it is sufficient to observe of them in general, that they usually bore the title of *Magna Charta*, or *Liber Magnæ Chartæ*, and they commonly contained all the acts down to the time of their publication. But some of those editions deserve more particularly to be remembered. In 1531, Berthelet printed some statutes with the common title of *Magna Charta, cum aliis Statutis*. Some few months after, in 1532, he printed another collection, under the title of *Secunda Pars Veterum Statutorum*. On the back of the leaf he informs the reader, that the following statutes were known to few, and were now printed for the first time,

(a) This book has been attributed by some to Henry VIII.; by others, to bishop Fox. Typ. Antiq. vol. I. 354.

(b) Typ. Antiq. vol. I. 324. 384. 402. 437.

(c) Ibid. 241. 417.

(d) The following are different editions of the statutes at large: By Pynson, in 1519, 1526, and 1527; by Wynkyn de Worde, in 1528; by Redman, in 1525, and 1539. Typ. Antiq. 127. 265. 275. 279. 386. 396.

having been most of them examined with the parliament-rolls; and because some other statutes, printed with *Magna Charta*, were intituled *Vetera Statuta*, he thought the present might very properly be called by the title he had given them (a). These titles seemed to please the editor; for in 1540, we find these two books again printed by Berthelet (b). In 1543, the same printer published, in one volume, all the statutes from Hen. III. to the first of Hen. VIII. (c). Before that, in 1534, there was printed by Redman, an edition of the statutes in English, translated by *George Ferrer*, which was reprinted in 1542 (d).

Next to the statutes at large, the abridgment of them presents itself. The Abridgment, mentioned in the former reign, seems to have been frequently reprinted. *Le Bregement de toutz les Estatuts* was printed by Pynson in 1521; and again, with additions by Wm. Owein of the Middle Temple, in 1528 (e). In 1527, an abridgment of the statutes was printed in English, by John Rastell (f); and in 1533, with considerable additions, by Wm. Rastell, under the title of "*The grete Abregement of the Statutys of Englonde, untill the 22d yere of Henry VIII* (g);" which was reprinted with the same title by Petit, and also by Myddylton, in 1542, containing the abridgment of statutes down to 33 Hen. VIII (h).

Thus far of collections of the statutes at large, and of abridgments of them. We find some specimens of those partial publications that have become of late days very common from the use they are of in practice. In 1538 was printed, *A booke, containing the statutes which the king had enjoined to be put in execution by justices of peace, sheriffs, bailiffs, constables, and other ministers of justice* (i). It should be added to this account of the statutes, that they

(a) Typ. Antiq. 419. (b) Ibid. 436. (c) Ibid. 443. (d) Ibid. 394. 554.
 (e) Ibid. 267, 268. 281. (f) Ibid. 330. (g) Ibid. 429. (h) 554. 573.
 (i) Ibid. 432.

were also printed regularly after every session of parliament.

The printing of the year-books was carried on with great earnestness during this reign; but, as has been before observed, owing to their being generally printed without a date, the time of their appearance, for the most part, cannot be ascertained (a). We know that they were mostly printed by Pynson, by Berthelet, and by Redman. The earliest that has been found with a date, was printed in 1517, by Pynson (b). They were usually printed single; but those from 22d to 28th of Ed. III. inclusive, were printed in one publication, in 1532. The famous *Annus Quadragessimus* was not printed till 1534 (c). Many remained unprinted at the close of this reign. Several ancient law-books were printed and reprinted. In 1522, we find the *Natura Brevium*, since called the *Old Natura Brevium*: in 1525, *The Olde Teners, newly corrected* (d). In 1531 was printed, by William Rastell, *The Regyster of the Wryttes orygynal and judycyall* (e). Britton was printed by Redman, but without a date: as was *Statham's Abridgment* by, or rather for, Pynson, who employed Tailleux, a printer of Roan in Normandy, to print Littleton, and many other books, amongst which this was most probably one, as it bears Tailleux's mark (f). The *Novæ Narrationes* were printed, but without a date.

Most of these books were reprinted by all the printers during this reign; law-books and school-books being those articles which the early printers were more frequently called upon to multiply than any other. But none passed through the press so often as Littleton's Tenures; the print-

(a) However, those versed in Typographical Antiquities have fixed the date of some. The 46th Ed. III. in 1517; the 7th and 48th Ed. III. in 1518; the 50th Ed. III. in 1519; the 47th Ed. III. in 1530. These were printed by Pynson, as was the *Liber Assisarum*, without a date. Typ. Antiq. 264, 265. 300.

(b) Typ. Antiq. 302. 400.

(c) Ibid. 420. 394.

(d) Ibid. 274. ..

(e) Ibid. 475. (f) Ibid. 241. 284. 399.

ing of which seems to have raised a violent competition between two famous printers of these days (a).

There was not less concern in this reign than in the former, about the ecclesiastical part of our law. *Lyndwode's Provinciale* underwent repeated impressions. In 1529, *The Legatine Constitutions of Otho and Ottoboni* were printed by Wynkyn de Worde (b). We find also a book without a date, intitled, *Tractatus Juris Canonici* (c).

We cannot dismiss this catalogue of new-printed books, without making a few remarks upon the most distinguished of them, *The Register of Writs*. *The Register of Writs* is said to be the oldest book in the law; a character which may, in a great measure, be true, but should not be allowed without some consideration. It is not more certain than extraordinary, that the forms of writs were very early settled, in their substance and language, nearly in the manner in which they were drawn ever after. However, this uniformity was not so exact, as that the writs published and used in the reign of Henry VIII. were all of them identically the same with those used at the first origin of this invention, in the reign of Henry II. It is not

(a) In an edition of Littleton, printed by Pynson, in 1525, there is the following address to the reader, containing a bitter iuvenile against Redman. *En tibi, candida lector, jam castigatio (ni fallor) Littletonus occurrit. Curavi ut e calcographia mea non solum emendatio, verum etiam elegantioribus typis ornatior prodeat in lucem, quam elapsus est e manibus Roberti Redman, sed verius RUDEMAN, quia inter mille homines RUDIOREM haud facile invenies. Miror profecto unde nunc tandem se fateatur Typographum, nisi forte quum diabolus sutorem nauclerum, et illum calcographum fecit. Olim nebulo ille profitebatur se bibliopolam tam peritum quam unquam ad Utopiam exisset: Bene scit, liber est, qui pro se speciem libri fert, preterea fere nihil; tamen ausus est scarra polliceri sua cura reverendas ac sanctas leges Angliae scite verique omnes imprimere. Utrum verba dare usus, an veram sit, tu Littletono legendo, scilicet sua cura ac diligentia excusos, illico videas. Vale.* Pynson attacked him in another edition of Littleton, and in one of *Magna Charta*.

Pynson was at this time jealous of Redman's rising merit and pretensions as a law-printer. But this some years after subsided, and a reconciliation probably took place, for Redman became successor to Pynson in his house and trade. *Typ. Antiq.* 274. 385.

(b) *Typ. Antiq.* 180. 287.

(c) *Ibid.* 287.

to be wondered that there should be a difference in these forms at their infancy, and at this advanced state of our law; but it is extremely remarkable that the difference should be so small.

As the writs in the printed Register must be taken to be such as they were used at the time of its publication, it will be curious and amusing to compare them with those in several antecedent periods of our law; with those in Glanville and Bracton; those in the reign of Edward I.; and those in the old *Natura Brevium*, in the reign of Edward III. This we shall attempt, by selecting some of the principal original writs.

To begin with Glanville. We find the writs of novel disseisin and of mortdauncestor, as given by that author (a), correspond exactly with those in the Register, in the scope, substance and words; with the difference only of the *teste* in the name of the grand justiciar, as all writs were then; of the king's stile, which was then always in the singular number; and of a return consistent with the order of judicature in those times. On the other hand, the writ of right of advowson (b), though it agrees in the main of it with that in the Register, is not *verbatim* the same. The *assisa ultimæ præsentationis* (c), differs only in a few words. The writ of debt (d) is *verbatim* the same, except that instead of alleging the *detinet*, it says, *injustè deforcat*. These are a few out of the many observations that might be made, on a comparison of the writs in Glanville with those in the Register.

The writs in Bracton, as to their compellation, *taste*, and direction, are nearer the present form than those in Glanville. As to the substance of them, it appears, that the writ *de dote unde nihil habet* (e), *assisa mortis antecessoris* (f), and *quare impedit* (g), agree with the Register ver-

(a) Vid. ant. vol. I. 178. 189. (b) Ibid. 137. (c) Ibid. 185. (d) Ibid. 158.
 (e) Lib. 4. Tr. b. c. 1, 2. Vid. ant. vol. I. 378. (f) Lib. 4. Tr. 3. c. 2.
 Vid. ant. vol. I. 358. (g) Vid. ant. vol. I. 355.

batim. The writ of *assisa ultimæ presentationis* (a) agrees in substance, but not *verbatim*: and the writ of *intrusion* differs entirely (b) from the Register.

In the time of Edward I. the subject of writs was studied with more nicety; therefore, after the near correspondence we have seen between the precedents of the time of Henry III. and those in the Register, we must not wonder to find it then still more. In the *Statutum Wallie*, among the regulations made for the judicial polity of that principality, there are forms of writs prescribed, which, no doubt, were copied from those used in our courts; and these, with the single difference of the returns, and the stile of the justices peculiar to the courts there, are *verbatim* the same with those in the Register; these are, the writ of dower, assise of mortdaunce, of novel disseisin, of common of pasture, of debt, of covenant, of appointing an attorney, and *de coronatore eligendo* (c).

The reigns of the three Edwards constituted a period when the learning of writs was cultivated with great attention. Accordingly we find, that the forms of them were so completely settled during that time, that the writs in the Old *Natura Brevium*, a collection made in the last of those three reigns, agree *exactly* with those of the Register; only the writ of intrusion (d), which differed so widely in Bracton's time, was not yet reduced to the form of the Register. In the time of Henry VIII. the writ of trespass and assault, the earliest precedent of which (except some records in Riley's *Placita*, in Edward I.'s reign) is in the Old *Natura Brevium*, has a very trifling difference from that in the Register. The writ in the former does not contain the following words of aggravation, *ita ut de vitâ ejus desperabatur*, which are in the latter.

(a) Lib. 4. Tr. 2. c. 1, 2. Vid. ant. vol. I. 349. 351. (b) Lib. 4. Tr. 1. c. 2. Vid. ant. vol. I. 320. 396. (c) Vid. ant. vol. II. 97, 98. (d) Vid. ant. vol. III. 89.

These differences, though many of them may appear in themselves quite immaterial, yet serve in some measure to date the antiquity of the writs collected in this volume. It may be inferred from this comparative view, that the substance of original writs, in their conception, drift, and language, is very ancient; that the alterations they have undergone have been very few, and those only in a small turn of phrase, the change of a word, or at most the addition of some small circumstance; that those changes were made in general very early; that the forms were, most of them, settled *verbatim* at least by the time of Edward III.; and in that state were afterwards printed in the Register in the reign of Henry VIII.

This observation as to the antiquity of writs, is only meant to apply to those common-law remedies which we have been just recounting, and the like; for many of the writs in the Register are evidently of later origin than the time of Edward III. being some of them framed upon statutes passed since, and others contrived in consequence of alterations in practice, or for other causes.

Having said thus much concerning the probable antiquity of the Register, we should next consider the contents of this volume; of which it will be sufficient to say, that it contains writs, original and judicial, adapted to the purpose of redress in every possible case of injury to the person or property; to provide for every incident which may arise in the course of a judicial proceeding; and, finally, to give the full effect to such proceeding by execution.

It was by degrees that writs increased to the multitude and variety which is exhibited in this volume. A sufficient foundation seems to have been laid for this superstructure even in Glanville's time. From the numerous writs, and the application of them, in Glanville's work, we can perceive, that at every turn and stop in proceeding, whenever there was a *dignus vindice nodus*, a writ was ready framed to remove the cause of delay, and expedite the progress of

the suit; so that there were, in his time, writs contrived suitable to very many occasions. In the time of Bracton we find them greatly increased; and yet, perhaps, this increase was not so much in the new kinds of writs, though that too was considerable, as in the variety of forms to suit similar cases of the same kind. Thus, for instance, where we find in Glanville only one precedent of an original writ, or at most two; in Bracton, there are sometimes seven or eight different forms, fitted to the special circumstances of particular cases.

In the times of Granville and Bracton, writs were *formata*; that is, every particular variation was *formed*, as we are told, by express authority of parliament, and the clerks in chancery could not alter an iota of that which had been sanctioned by the legislature. If the increase of writs was so rapid under the great difficulty of applying to parliament in every new case, it is not to be wondered, that after the statute of Westminster 2. had allowed the clerks to make writs *in consimili casu*, the number and variety of them should multiply to the degree they did; and that where there were seven or eight different precedents of one kind in Bracton, there should be ten or more in the Register in the present reign. The construction of *similar cases* left such a latitude, when applied to every writ at that time existing and in practice in the chancery, that the masters, who were appointed for this special purpose, devised new writs with great readiness, on most occasions, where they were warranted by any colour of former precedent; so that, in consequence of this statute, the business of making new writs became intirely a matter of legal discretion.

When things had taken this course, writs came under a very different consideration from that in which they stood formerly. In early times, when they were in a stated form, and that form was in general known only to those in the chancellor's office, the courts used to consider them-

selves as bound to abide by them, whatever they were; looking upon them as precepts issuing out of an office where themselves had no controul or direction, and taking for granted that they were in the usual course: but after this statute, writs were no longer a point of official knowledge. The masters, whose particular business was the making of writs, were chosen for their learning in the law; and as they could frame them only on principles of legal analogy, the courts took upon them to judge of the legality of them, as a matter to which they were equally competent with the masters. Hence it was that writs became a new learning among the professors of the law: and we find in the reign of Henry VI. no less than ten inns of chancery established for this particular study; which was considered as containing the first principles of the law, and that in which young men could employ their noviciate with the greatest advantage.

This, in time, had very material consequences. The knowledge of writs was so far from being peculiar to the masters, that they were not even the most knowing in their own art. This knowledge was in the hands of every body; and he who had most knowledge of the law, was the best able to word a writ. It then happened, that the masters, as they grew to be of less consideration for this particular skill, in time neglected the study entirely; and the practicers were under the necessity, for the safety of their cause, to get lawyers of eminence to settle the form of a writ. This they presented at the office to be put to the seal, under the inspection of a master; till at length even that formality ceased; and in this reign it had become the practice to pass them only through the cursitors' office, without any interference of a master, and so present them for sealing. Thus, by a singular revolution, did the making of writs become again a matter, as it were, *de cursu*; in which the chancery took no further concern than what related to the ceremony of the seal.

The masters in chancery in this reign were men quite of another profession: they were most of them civilians and ecclesiastics; and it had been a rule with the chancellor to present them to churches not exceeding twenty marks in value (*a*).

When things were in this state, the Register was printed; by which this kind of learning seemed to be made more declaredly *publici juris* than ever. Whether it is to be attributed at all to the publication of this book, which might have taken off any peculiar sanctity heretofore ascribed to its forms; or to the inattention and want of skill in the then set of masters; or to the unaccountable change of opinions in matters of law, as well as in every thing else: whatever was the cause, it so happened, that soon after the present period, this repository of chancery-learning began to be looked upon with less reverence than formerly. In the reign of queen Mary, it was said by a judge on the bench, that a writ was not exceptionable because not to be found in the Register; the truth of the case was now to be the guide in drawing a writ, and not the precise form that was exhibited in the Register (*b*).

Indeed the knowledge of writs had long been so general, that probably the same opinion was held respecting this collection at the time it was published. However that may be, it was certainly at that time a valuable addition to the law-library. For though it was not then considered as furnishing a collection of forms and rules conclusive and incontrovertible; yet it must be received as a set of precedents of the highest authority, and approaching nearer to absolute perfection than any thing then in print. With regard to posterity, it stands in a different light. The revolution which had begun to take place in the methods of redress, and which was now becoming every day more general, rendered great part of this famous volume obsolete before the world was put in possession of it; and the current

(*a*) Hist. Chanc. 36.

(*b*) Plowd. 229.

has ever since set so strong the same way; that, at this time, the Register is reduced to a piece of juridical antiquity; and is oftener recurred to as a matter of historical curiosity than of practical use. The selection made by Fitzherbert is abundantly more than sufficient for the few enquiries now made into the nature of writs.

It appears from a manuscript of this reign, re-^{Miscellaneous}lating to the government and discipline of the ^{factu} Middle Temple, that the members of that society were divided into two companies, called *Clerks Commons*, and *Masters Commons*. The first consisted of young men during their first two years standing, or thereabouts, till they were called up to the Masters Commons. The Masters Commons was divided into three companies, that is, *No Utter Barrister*, *Utter Barristers*, and *Benchers*. The first of these were such as from their standing, or neglect of study, were not called upon by the Elders or Benchers to dispute and argue some point of law before the Benchers: those disputes were called *Mootings*. *Utter Barristers* were such as were five or six years standing, and were called upon to argue at the Mootings; so that making an Utter Barrister, was conferring a sort of degree for the party's progress in learning. *Benchers* were such Utter Barristers as had been in the house fourteen or fifteen years; they were chosen by the Elders of the house to read, expound, and declare some statute openly to all the society. During the time of his reading, this person was called a *Reader*, and afterwards a *Bencher*.

There were, as they expressed it, two principal times of their *Learning*: these were called *Grand Vacations*. One begun the first Monday in Lent; the other, the first Monday after Lammas; each continued three weeks and three days. It was at these seasons that the readings were; in the former, by the Benchers themselves; in the latter, by the Readers. The young members of two years were required to be present at these readings, under

pain of forfeiting twenty shillings for every default. The Grand Vacations were employed in other exercises for the advancement of knowledge; an Utter Barrister was to oppose some point alleged by the person reading. The young members were called upon to argue some point in presence of three Benchers; they were followed by the Utter Barristers; and, lastly, the Benchers were to decide. This was all carried on in Law-French. Such was the form of Mooting. Exercises of this kind were performed not only in the Grand Vacations, but in Term.

After the Term and Grand Vacations; such young men as were *No Utter Barristers*, were to argue some points in Law-French before the Utter Barristers, who were to decide in English: these were called *Mess Vacation-Meets*, or *Chapel-Meets*. Further, every day in the year but festivals, the students of each mess, being three, used to argue among themselves after dinner and supper.

The *Middle Temple* used to provide two Readers, being Utter Barristers, for the two inns of chancery, *Strand Inn* and *New Inn*. These read to the students there in Term and Grand Vacation: the students there mooted as in the Temple, and each reader used to bring two with him from the Temple to argue and moot. It seems, also, that each of the four inns of court sent two persons to every inn of chancery to argue, and after such debate the Reader used to give his opinion.

Such was the education of ancient time in the inns of court and chancery. But this was all voluntary, none being, as the same manuscript acquaints us, compelled to learn. We are informed also by the same authority, that the young students of the *Middle Temple* had their studies and places of learning so unfortunately situated, that they were very much annoyed by the walking and communication of those who were no learners. In the term-time, they were disturbed by clients and clients servants resorting to attorneys and practitioners, so that they might as well be in

the open streets as in their studies. The same writer complains, that they had no place to walk in, and talk, and confer their learning, but in the church; which place, all the term-time, had in it no more quietness than the *Perryse of Pawle's* (a), by occasion of the confluence and concourse of such as were suitors in the law (b). Owing to this house having no revenue for the encouragement and support of students, it is observed by this writer, that many a good wit was compelled to forsake study, before he had acquired a perfect knowledge in the law, and *to fall to practising, and become a typler in the law* (c).

In the 32d Henry VIII. an order was made in the Inner Temple, that the gentlemen of that company should reform themselves in their cut or disguised apparel, and not wear long beards; and that the treasurer of that house should confer with the other treasurers of court for an uniform reformation, and to know the justices opinion therein (d). In Lincoln's Inn, by an order made 23d Hen. VIII. none were to wear cut or pansied hosen or breeches, or pansied doublet, on pain of expulsion (e); and all persons were to be put out of commons during the time they wore beards (f). The first serjeants at law that received the honour of knighthood, were knighted in 28th of Hen. VIII (g).

In the 37th Hen. VIII. a further increase was made in the fees of the judges: To the chief-justice of the king's bench, 30*l.* per ann.; to every other justice of that court, 20*l.* per ann.; to every justice of the common-pleas, 20*l.* per ann. (h). There is a manuscript of this reign which sets forth the whole ceremony of calling serjeants; but it is too long for this place, and may be seen in Dugdale (i).

(a) We have before noticed the custom of Serjeants choosing their pillar at St. Paul's, and taking down their client's case on their knee*. That custom, together with the mention of the *Perryse of Pawle's*, on this occasion, seems to open a passage in Chaucer's character of the Serjeant at Law. A serjeant of the law both ware and wise,
That often had yben at the Perryse.—PROB. CLAW. TAZES.

(b) Dugd. Orig. 196. (c) Ibid. (d) Ibid. 140. (e) Ibid. 242.
(f) Ibid. 244. (g) Ibid. 137. (h) Ibid. 110. (i) Ibid. 114.

* Vid. ant. vol. II. 360.

CHAP. XXXI.

EDWARD VI. PHILIP AND MARY.

The Reformation established—Act of Uniformity—The Roman Catholic Religion re-established—and the Papal Authority—The Royal Authority of a Queen—The Poor Laws—Tipling and Gaming Houses—Payment of Tythes—Traverse of Offices—Sale of Horses—Administration of Justice—Criminal Law—Repeal of Treasons and Felonies—House-breaking—Offences against the Common Prayer—Unlawful Assemblies—Robbing in a Booth or Tent—Of the Revisor of Stat. 25 Hen. VIII. c. 3.—Trial of Felons in Foreign Counties—Clerks Convict—Repeal of Treason, Felonies, and Præmunire—Riotous Assemblies—Punishment of Gypsies—Stealing of Women—Of Bail—Of Witnesses in Treason.

IT could hardly be expected that the short period of twelve years should be productive of much alteration in our laws: but these two reigns, on the contrary, hold a distinguished place in our juridical history. An attention to the reformation of religion in the former, and a determination in the latter to bring all things back to their ancient state, almost wholly engaged the princes on the throne. These revolutions called for a frequent interference of the parliament. In the midst of these changes, some acts were passed, which had great influence on the administration of justice; and others, relating to our criminal law, which

are more particularly deserving of notice. Meanwhile, the activity and designs of the government were such, that these two reigns are fruitful of interesting facts regarding the practice and execution of our penal laws.

The attack made on the hierarchy in the reign of Henry, by taking away the authority of the Pope over persons and causes of a spiritual nature, prepared the way for a complete reformation. When the system of papal subordination was once broken, a new regulation in doctrine and worship might be accomplished with less obstruction and difficulty. This was the work of Edward VI.'s reign.

Great part of the nation were disposed to an alteration in the established form of religion, from a conviction of its vanities and foppery. Those who still adhered to the old superstition, saw themselves without the sanction they once derived from the holy see, and the privileges of churchmen. The clergy, now reduced under subordination to the king as supreme head, had sunk into the condition of their fellow-subjects. In this state of things there was less danger to be apprehended from opposition to any reformation that might be attempted.

The first act of the legislature was intended for the abolition of the mass, with all its numberless abuses and superstitions; which was to be done by restoring the communion to its primitive institution. This was by stat. 1 Ed. VI. c. 1. which contains a long and accurate preamble concerning the appointment of this sacrament by Christ; stating, that it is "called in Scripture a supper, "the table of the Lord, the communion and partaking of "the body and blood of Christ; but that many persons had "condemned in their hearts the whole thing, on account of "certain abuses heretofore committed in the misapplication "of it." For these reasons it was enacted, in the first place, that whosoever shall deprave, despise, or contemn the sacrament, by contemptuous words, or otherwise, shall suffer imprisonment, and make fine, at the king's pleasure: the of-

The Reformation established.

fence is to be enquired of, by the oaths of twelve men, at the quarter-sessions; the indictment to be brought in three months after the offence; and a writ is to be directed to the bishop of the diocese to attend in person, or by deputy, at the sessions.

But the principal object of the act was to restore the communion in both kinds, which, the preamble says, "was more agreeable both to the first institution of the sacrament of the body and blood of Christ, and also more conformable to the common use and practice of the apostles, and of the primitive church, for 500 years and more after Christ: and further, that it was more agreeable to the first institution, and the usage of the primitive church, that the people being present should receive the same with the priest, than that the priest should receive it alone." It is therefore enacted, that the sacrament shall be administered to the people within the church of England and Ireland, and other the king's dominions, under both kinds; and the minister shall not, without lawful cause, deny the same to any person. However, there is no enacting clause concerning the priest not taking it alone; nor are there any penalties annexed.

The next statute made by the parliament was stat. 1 Ed. VI. c. 2. and this had the Reformation in view. Having stated that elections of bishops by *congé d'élire* were mere shadows of elections, and attended with great delay and expence, and that they seemed derogatory and prejudicial to the king's prerogative, it provides, that they shall in future be appointed by the king's letters patent. All process was to be in the king's name, but the *teste* in that of the bishop; except the archbishop of Canterbury, who might use his own seal.

Then follows stat. 1 Ed. VI. c. 12. which repeals (a) stat. 5 Rich. II. stat. 2. c. 5. and stat. 2 Hen. V. c. 7. that had

(a) Sect. 2.

been made against Lollards, and had been put in execution in the last reign: besides these, it repeals stat. 25 Hen. VIII. c. 14, concerning the punishment of heretics and Lollards; the statute of the six articles, 31 Hen. VIII. c. 14.; stat. 34 and 35 Hen. VIII. c. 1. concerning the books of the Old and New Testament in English, the printing, reading, having, or selling them; and also stat. 25 Hen. VIII. c. 5. which qualifies the statute of the six articles. All these statutes in particular, and every other act of parliament concerning doctrine and matters of religion, were thereby repealed and made void. By the same act, there are penalties inflicted on those who deny the king's supremacy, or affirm that the bishop of Rome(a), or any other person, is, or ought to be, by the laws of God, supreme head of the church of England and Ireland.

The last remains of superstitious establishments were destroyed by stat. 1 Ed. VI. c. 14. which gave to the king all chantries, colleges, and free chapels; all lands given for the finding of a priest for ever, or for the maintenance of any anniversary, *obit*, light or lamp in any church or chapel, or the like; all fraternities, brotherhoods, and guilds (except those for mysteries and crafts,) with all their lands and possessions. There are several exceptions in this act, which have saved some of the least objectionable of these institutions (stripped, however, of their superstitions), and such as were only included in the expressions of the act, but not in its design; as the universities, and colleges for learning and piety.

This is followed by stat. 2 and 3 Ed. VI. c. 1. for the uniformity of service, and administration of the sacraments. This act states, that there had been for a long time divers forms of common-prayer; as the use of *Sarum*, of *York*, of *Bangor*, and of *Litania*; and besides these, many more forms had of late been used, as well in morning and evening

(a) Sect. 6.

prayer, as in the communion, commonly called the mass: that the king had endeavoured in vain to prevent other innovations of this kind, and therefore had appointed the archbishop of Canterbury and other bishops to draw one convenient and meet order of prayer and administration of the sacraments, to be used all over England and Wales, which they had now performed in a book intituled, "*The Book of the Common-Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, after the Use of the Church of England*:" wherefore it was enacted, that every minister in cathedrals, parish-churches, and other places, should be bound to say and use the psalms and even-song, celebration of the Lord's supper, commonly called the mass, and administration of each of the sacraments, and all their common and open prayer, in such order, and form as is mentioned in the aforesaid book, and not otherwise, under certain penalties which we shall hereafter mention. That the clergy might be relieved from the restraint which had been imposed on them by the Romish church, in violation of the first command given by Heaven to mankind, it is declared by stat 2 and 3 Ed. VI. c. 21. that all laws, canons, constitutions, and ordinances, which forbid marriage to any ecclesiastical or spiritual person who by God's law may lawfully marry, shall be void: and to compel the performance of marriage, where engagements had been made, the stat. 32 Hen. VIII. c. 38. (only as far as concerned pre-contracts) was repealed by stat. 2 and 3 Ed. VI. c. 28.; and the ecclesiastical judge is thereby authorized to give sentence for solemnization of marriage, upon a pre-contract, as before that act.

The foregoing laws were rather intended to institute and build up, than to destroy; but such steps having been taken, the Reformation was pushed on with more vigour, and a sort of persecution was begun against the old superstition. It was enacted by stat. 3 and 4 Ed. VI. c. 10. that since the common-prayer had been set forth, containing nothing but the pure word of God, the corrupt,

vain, untrue, and superstitious services should be disused ; and therefore all antiphoners, missals, grailes, processions, manuals, legends, pies, portuasses, primers, in Latin or English, couchers, journals, ordinals, and all other books, should from thenceforth be abolished : all persons and bodies corporate having any such books or images, taken out of churches or chapels, were to destroy such images, and deliver such books to the bishop or his commissary within three months to be destroyed ; and persons who omitted so to do, were to forfeit for every book 20s. for the first offence ; 4l. for the second ; and for the third, imprisonment at the king's will. And for putting to utter oblivion, as the statute says, the usurped authority of the see of Rome, as well as for the necessary administration of justice, the king was empowered, in like manner, as Henry VIII. had been, by stat. 3. and 4. Ed. VI. c. 11. during three years to appoint thirty-two persons to examine the ecclesiastical laws, and reform them ; and by the same statute, c. 12. to appoint six prelates and six other persons to draw up a form and manner of making and consecrating archbishops ; bishops, priests, deacons, and other ministers of the church.

The execution of these two commissions took up the attention of the reformers, and some time was employed in altering the common-prayer-book, where exceptions had been made to it, or it was otherwise thought convenient to amend or enlarge it. After this was completed, at least the form of ordination and the prayer-book (for the ecclesiastical laws took longer time, and after all were not finished soon enough to be confirmed), a second act of Act of uniformity. uniformity was passed, namely, stat. 5 and 6. Ed. VI. c. 1. This act begins by stating, that many persons refused to come to their parish-churches, and other places where prayer, administration of the sacraments, and preaching was used : it enacts, therefore, that all persons shall faithfully *endeavour themselves* to resort to their parish-church or chapel where the common-prayer and such service was used, upon every Sunday and holy-day, and there

abide during the time of common-prayer and preaching, upon pain of the censures of the church, which the bishops are solemnly in God's name required to see executed ; and they are thereby empowered to reform and punish all such offences. And because, says the statute, many doubts had arisen about the said service, "*rather by the curiosity of the ministers and mistakers, than of any other worthy cause,*" the king had caused the book of common-prayer to be faithfully perused and made perfect, and now annexed it, so explained and perfected, to this act ; at the same time adding a form and manner of consecrating archbishops, bishops, priests, and deacons, to be of like force and authority as the former, with the same provisions as by stat. 2 and 3 Ed. VI. c. 1. were ordained ; which statute is declared to be in force for establishing this book, now explained and perfected, and the form of consecration and ordination. Any person being present at any other form of prayer than according to this book, is, for the first offence, to be imprisoned six months ; for the second, a whole year ; and for the third, during life : for the better observation of this act, curates are directed once a-year to read it on a Sunday in the church, *at the time of the most assembly*. The next statute (a) appoints the fasts and feasts, as they are now in the calendar.

The last statute made upon the occasion of these alterations in religion was stat. 5 and 6 Ed. VI. c. 12. to confirm and explain the former stat. 2 and 3 Ed. VI. c. 21. concerning the marriage of priests. The statute says, that evil-disposed persons had taken occasion, from certain words in that act, to say that it was but a *permission, like that of usury and other unlawful things* ; and therefore, that children born from such nuptials should rather be accounted bastards than legitimate. To avoid this slander, the statute enacts positively, that the marriage of priests and spiritual persons is true, just, and lawful, to all intents and purposes, and their children legitimate, as any other born in wedlock, as to inheritance and every other legal right.

It was upon these acts of parliament that the reformed church stood at the death of Edward VI.

Queen Mary soon overturned every thing which had been done in the former reign for a ^{The Catholic} religion re-
 reformation of religion. After an act repealing ^{established;}
 all new-created treasons, felonies, and cases of præmunire, and another to establish her own legitimacy, and declare null and repealed all sentences, orders, and laws to the contrary; an act was passed, stat. 1 Ma. st. 2. c. 2. repealing all the under-mentioned statutes, being all that were passed in her brother's reign for the reformation of the church; namely, stat. 1 Ed. VI. c. 1. against such as speak unreverently of the body and blood of Christ; stat. 1 Ed. VI. c. 2. relative to the election of bishops; stat. 2 and 3 Ed. VI. c. 1. concerning uniformity of service and administration of the sacraments; stat. 2 and 3 Ed. VI. c. 21. made to take away all positive laws against the marriage of priests; stat. 3 and 4 Ed. VI. c. 10. made for the abolishing of divers books and images; stat. 3 and 4 Ed. VI. c. 12. made for the ordering of ecclesiastical ministers; stat. 5 and 6 Ed. VI. c. 1. made for the uniformity of common-prayer and administration of the sacraments; stat. 5 and 6 Ed. VI. c. 8. made for the keeping of holy-days and fasting-days; and stat. 5 and 6 Ed. VI. c. 12. touching the marriage of priests, and legitimating their children: and it was moreover enacted, that all such divine service and administration of sacraments as were most commonly used in England in the last year of Henry VIII. should be used through the realm, and no other.

Thus was the national worship brought back to the state it was in at the death of Henry VIII.; and that it might be performed without disturbance or impediment, it was enacted by stat. 1 Ma. st. 2. c. 3. that any person who by word or deed should maliciously molest any preacher, authorised to preach, in his sermon, preaching, or collation; or should maliciously disturb any lawful priest, preparing or

celebrating the mass, or other such service, sacraments, or sacramentals, as were most commonly used in the last year of Henry VIII. or spoil or deface the sacrament commonly called the sacrament of the altar, or the *pir*, or canopy where the sacrament was; or break any altar, crucifix, or cross, in any church, chapel, or church-yard; such offender should be taken before one justice, who, if he thought fit, was to commit him to custody: and within six days the same justice, with another, was to examine him; and if he was convicted by two witnesses, or his own confession, they were to commit him for three months, and further to the next quarter-sessions; when, if he did not repent, he was to be again committed till he became reconciled and penitent. If such offenders were not immediately taken, the parish was to forfeit 5*l.* to be levied as in cases of *hue and cry* by the statute of Winchester, and stat. 5 Hen. VII. c. 1. Notwithstanding this statute, the ordinary might punish these offences by ecclesiastical censures, so as none were punished twice. The penal provisions of this act are much stricter than any the Reformers had made in the former reign, to secure their establishment, in matters of the like kind.

Severer methods were now preparing for the correction of those who did not conform to the religion of the court. By stat. 1 and 2 Ph. and Ma. c. 6. there is a revivor of stat. 5 Ric. II. st. 2. c. 5. concerning arresting of heretical preachers; of stat. 2 Hen. IV. c. 15. touching repressing of heresies, and punishment of hereticks; and of stat. 2 and the papal authority. Hen. V. c. 7. concerning the enormity of heresy and Lollardy, and the suppression thereof. After these three penal laws were revived against heresy, there follows a very long act of parliament, containing a history almost of the return of the nation into the bosom of the Romish church; and the complete re-establishment of the pope's authority here, as it had been in the twentieth year of Henry VIII. before the innovations begun in that king's reign.

This is stat. 1 and 2 Phil. and Ma. c. 8. It opens by stating, that "much false and erroneous doctrine had been taught, and spread abroad here since the twentieth year of Hen. VIII. so that as well the spirituality as the temporality had swerved from the obedience to the see apostolic, and declined from the unity of Christ's church, and so continued until her Majesty was first raised up by God to the throne, and then married to the king; to whom (as unto persons undefiled, and by God's goodness preserved from the common infection) and to the whole realm, the apostolic see had sent the lord cardinal Pole, legate *de latere*, to call them home again into the right way, from whence they had a long while wandered: that they, seeing their errors, had acknowledged them (which the two houses did upon their knees) (a) to that most reverend father, and by him were received, at the intercession of the king and queen, into the unity and bosom of the church; and that they then made an humble submission and promise, for a declaration of their repentance, to repeal such acts as had been made since the twentieth year of Henry VIII. against the supremacy of the pope." Then follows the supplication of the two houses to the king and queen for them to intercede with the cardinal to obtain from the pope a remission of all censures and sentences which they had incurred by the laws of the church, and to be received into the church: all which having been performed, they now proceeded in this statute to accomplish their promise, and repeal all laws made against the supremacy of the see of Rome.

The first repeal was of that part of stat. 21 Hen. VIII. c. 13. made against licences and dispensations from Rome for pluralities and non-residence; then the whole of stat. 23 Hen. VIII. c. 9. against citing out of the diocese where a person dwells, except in certain cases: stat. 24 Hen. VIII.

(a) Burn. Ref. vol. II. 272.

c. 12. that appeals in such cases as had been used to be pursued to the see of Rome, should not be had or used within the realm: stat. 25 Hen. VIII. c. 19. called the submission of the clergy: stat. 25 Hen. VIII. c. 20. for non-payment of first-fruits to the see of Rome, and consecration of bishops within the realm: stat. 25 Hen. VIII. c. 21. concerning exonerating the king's subjects from exactions and impositions before that time paid to the see of Rome; and for having licences and dispensations within the realm, without suing further for them. All these statutes are totally repealed; as was stat. 26 Hen. VIII. c. 1. concerning the king's highness being supreme head of the church of England, and to have authority to reform and redress all errors, heresies, and abuses in it: stat. 26 Hen. VIII. c. 14. for the nomination and consecration of suffragans: stat. 27 Hen. VIII. c. 15. empowering the king to name thirty-two persons, clergy and lay, for the making of ecclesiastical laws: stat. 28 Hen. VIII. c. 10. for extinguishing the authority of the see of Rome: stat. 28 Hen. VIII. c. 16. for the ease of such as had obtained pretended licences and dispensations from the see of Rome: all that part of stat. 28 Hen. VIII. c. 7. which concerns a prohibition to marry within the degrees mentioned in the act: stat. 31 Hen. VIII. c. 9. authorising the king to make bishops by his letters patent: stat. 32 Hen. VIII. c. 38. concerning pre-contracts, and degrees of consanguinity: stat. 35 Hen. VIII. c. 3. for the ratification of the king's stile: such part of stat. 35 Hen. VIII. c. 1. as concerned the oath against the supremacy; and all oaths thereupon had, made, and given, were declared to be utterly void and repealed: stat. 37 Hen. VIII. c. 17. that doctors of the civil law, being married, might exercise ecclesiastical jurisdiction: that part of stat. 1 Ed. VI. c. 12. sect. 7. which punishes those who deny the king's supremacy. That clause and all other clauses in that act contrary to the supremacy of the pope, and all other acts of parliament made since the

twentieth of Henry VIII. against the supreme authority of the pope's holiness, are generally repealed.

But lest the repeal of these laws, and the admission of papal authority in all its plenitude, without any saving for such establishments and accidents which had been produced of late years, should bring the property and condition of many into great hazard, and introduce the extremest confusion, it was necessary to go further; and the parliament made another supplication to their majesties to intercede with the cardinal, that the following points should be settled by the pope's authority, *that all occasions, say they (a), of contention, grudge, suspicion, and trouble, may be taken away*: 1st, that all bishoprics, cathedrals, or colleges, now established, might be confirmed; 2d, that marriages made within such degrees as were not contrary to the law of God might be confirmed, and the issue declared legitimate; 3d, that institutions into benefices, and 4th, all judicial process might be confirmed; and lastly, that all settlements of land of bishoprics, monasteries, or other religious houses, might continue as they were, without any trouble from ecclesiastical censures or the laws.

A supplication likewise from the clergy (b) prayed that the lands and goods of the clergy might remain as they were. The cardinal made a dispensation as to all these particulars (c), and granted them fully; which dispensation was now ratified in every point by the parliament. It is, however, in addition to this, enacted (d), that all persons and bodies corporate, as well as the crown, shall enjoy all the possessions alluded to, as they were intitled to enjoy them before the first day of that parliament; and all assurances of land by Henry VIII. and Edward VI. are confirmed. But to encourage a renewal of like monastic institutions, it was enacted, that persons seised in fee might give lands to spiritual corporations without licence of mort-

(a) Sect. 25.

(b) Sect. 31.

(c) Sect. 32.

(d) Sect. 34.

main, or writ of *ad quod damnum*, notwithstanding the statutes of mortmain (a); with reserve of a tenure in frank-almoigne, or a tenure by divine service, notwithstanding the statute of *quia emptores*: this licence to alien in mortmain to continue only for twenty years.

In fine, it was declared, that the see of Rome was to have and enjoy such authority, pre-eminence, and jurisdiction, as his holiness did or might exercise by his supremacy (and the bishops such ecclesiastical jurisdiction) before the 20th year of Henry VIII. In this manner was the Roman catholic religion and the papal authority again established by law.

Having so far considered such statutes as effected alterations in religion, we shall now mention a remarkable one respecting the regal state, and then proceed to those concerning persons and private property, with the administration of justice.

The royal authority of a queen. The stat. 1 Mar. sect. 3. c. 1. sets forth, that because the statutes of the realm attributed all prerogative and pre-eminence to the name of *king*, together with the punishment and correction of offenders; therefore some malicious and ignorant persons had pretended to think that the *queen* could not take the benefit and privilege of them: it then proceeds to make a declaration of the law on this point, and enacts, that the law of this realm is, that the kingly or regal office, with all its dignity, prerogative, and power, being invested either in male or female, ought to be *as fully deemed and taken in the one as in the other*; and whatever the law has appointed the king to have or do, the same the queen may enjoy and exercise without doubt or question.

When the speaker of the house of commons brought in this bill, many wondered what could be the intention of such a law on a matter which seemed to be without dis-

pute. The secret design of this act was afterwards related by *Fleetwood*, the recorder of London, to Lord *Leicester*, from whose minutes of the story a learned prelate has made it public (a). The bill, as first brought in, declared also that the queen had as much authority as *any other of her progenitors*. It was objected to this, that she was thereby declared to have as much authority as *William the Conqueror*, and might, like him, seize all the lands of Englishmen, and give them to strangers: this suggestion, together with the jealousy then entertained of the Spanish match, induced the house to go into a committee, where the bill was at length qualified, and made to speak the language above-mentioned.

But the original motive for the act was this: a book had been presented to the queen by the imperial ambassador, in which were sketched the outlines of a plan of government for the queen to adopt. She was to take advantage of the notion, that all limitations by statute on the regal power regarded kings, and not queens, of England; she was to declare herself a conqueror; or, that she succeeded by the common law, and not by statute, which could not, upon the above-mentioned principle, bind her; and thus she was to be at liberty to establish religion and government as she pleased. It is said, that the queen, very much to her honour, expressed a dislike of this bold performance, and thought the design contrary to her coronation oath; and having communicated it to *Gardiner*, in the ambassador's presence, committed it to the flames, with some rebuke of his excellency for presuming to tempt her with such projects. *Gardiner* was alarmed at this bold beginning of the Spanish influence: and to prevent such designs for the future, he drew this act, in which, though he seemed to intend an advantage to the queen, by putting her title beyond dispute; yet he really meant that

(a) Barn. Ref. vol. II. 258.

she should be restrained by all those laws to which the former kings of England had consented.

We have not had occasion to speak of any parliamentary provision on the article of purveyance since the time of Edward III (*a*). The only object had since been, to procure a due and regular execution of those acts, without making any new ones (*b*). As a popular measure, in the reign of Edward VI. the operation of purveyance was suspended for three years, except for barges, ships, carts, and things necessary for carriages: it was provided, that for post-horses a penny a mile should be paid; for carts four-pence, if for the household; if for the wars, three-pence (*c*). This act, however, had no long continuance: but in the next reign some regulations of a permanent nature were made on this head. It was ordained by stat. 2 and 3 Ph. and Ma. c. 6. that no commissions of purveyance should be for any more than six months: they were to contain the counties within which the purveyance was to be made, and opposite each county blanks, where were to be written the things to be purveyed in each, with their several prices, and the name subscribed of the constables who were employed to procure them, and were privy to their delivery; a docket of which, subscribed by the commissioner of purveyance, was to be lodged with the several constables upon the delivery; who were to give it to the justices of the place; and they were to certify the contents of such dockets to the stewards of the household. All former statutes against purveyors and takers were thereby extended to their undertakers, deputies, and servants; and all commissions for purveyance were henceforward to be in the English language. By another chapter of the same statute (*d*), it was ordained, in conformity with an ancient privilege of the two universities, that there should be no

(*a*) Vid. ant. vol. II. 370. (*b*) Vid. ant. vol. III. 272, 273. (*c*) Stat. 2. and 3. Ed. VI. c. 3. (*d*) Ch. 15.

purveyance within five miles of Oxford or Cambridge, except when the king or queen came there.

The article of vagrancy and begging seems to have become a greater grievance than ever; and in the solicitude to correct and suppress the effects of this evil, the parliament, during these two reigns, more than once changed its system of conduct. The first interposition was by stat. 1 Ed. VI. c. 3. which laments the increase of vagabonds, and declares them to be *more in number than in* The poor laws. *other regions.* The design now was to treat such offenders with extreme severity: this act, therefore, begins with repealing all former laws for the punishment of vagabonds and sturdy beggars; it then ordains, that any person may apprehend those living idly, wandering, and loitering about without employment, being servants out of place, or the like, and bring them before two justices, who, upon proof by two witnesses, or confession of the party, were to adjudge such offender to be a vagabond, and to cause him to be marked with a hot iron on the breast with the mark of V, and adjudge him to be a slave to the person who brought and presented him, and to his executors, for two years. The person was to keep him upon bread, water, or small-drink, and refuse-meat, and cause him to work by beating, chaining or otherwise, in any work or labour he pleased, be it ever so vile. If such slave absented himself from his master within the two years, for the space of fourteen days, then he was to be adjudged by two justices to be marked on the forehead, or the ball of the cheek, with a hot iron with the sign of an S, and farther adjudged to be a slave to his master for ever; and if he run away a second time, he was to be deemed a felon. Any person to whom a man was adjudged a slave, had authority to put a ring of iron about his neck, arm, or leg. A similar course of treatment was by act directed for clerks convict, which will be considered in another place.

Any child of the age of five years, and under fourteen,

wandering with or without such vagabonds might be taken, and adjudged by a justice to be servant or apprentice to the apprehender till twenty years of age if a female, and twenty-four if a man-child: the child to be treated as a slave, and punished with irons or otherwise, if he run away. The master might assign, and transfer such slaves for the whole or any part of their time. If such slaves, either during their slavery, or after they were set free, beat or wounded their masters, or conspired with others so to do, they were to suffer as felons, unless the person injured would take the offender as a slave for ever.

If vagabonds were not apprehended in the before-mentioned manner, every justice was required to make search for, and examine all persons of that description; and having enquired of any one so apprehended, the town, city, or village where he was born, he was to send him, with a writing on parchment testifying his vagrancy and settlement, from constable to constable, to the head officer of such place; to be made a slave to the inhabitants thereof, in some public works, for the term; and under all the circumstances before-mentioned in the case of any private master; with a penalty on the place, if such slave was suffered to pass three working-days without employment. Such towns and the inhabitants might assign or transfer their slaves, as private masters. If it happened that the vagabond was not born at that place, he was to be made a slave to the inhabitants for the lie he had told, and was to be marked with an S. Foreign vagabonds were to be treated in the same manner as English, except the marking in the breast or face; and they were to be sent to the next port to work till they could be conveyed abroad, at the cost of the inhabitants.

Thus far of vagabonds: those idle persons who, from their infirmities, could not be properly treated as such, and who were born, or had been for the most part conversant and abiding for the space of three years in any place,

were to be sought out before a certain day mentioned in the act, by the head-officer of the place, and provided with cottages, or other convenient houses to be lodged in, and relieved and cured by the devotion of the good people of the place. None but such as were born there, or had been conversant and abiding for the above space, were after that day to remain and beg abroad within the precinct of the place: and a penalty was imposed on the head-officer suffering it three days: For the clearing away of such as were not so settled, head-officers were required to make a search every month, and send them away in carts or otherwise, from constable to constable, to their proper settlement, under penalty for neglect of such search. If such infirm persons were not wholly disabled from working, the inhabitants were to provide them work in common, or appoint them to such private persons as would; and such as refused to work, or run away, were to be punished discretionally with chains, beating, or otherwise. For the promotion of this plan, the parson or curate every Sunday, after reading the gospel, was to exhort the people to remember the poor people, their brethren in Christ, born in the same parish, and needing their help.

The parliament did not rest content with this act. The great and unexampled severity of those provisions about slavery had prevented it from being carried into execution. Something new was therefore done on this subject a few years after. By stat. 3 and 4 Ed. VI. c. 16. the before-mentioned statute and every other act on this subject, except stat. 22 Hen. VIII. was repealed; and it was ordained, that the ordering of vagrants and beggars should depend upon stat. 22 Hen. VIII. c. 12. (a) which statute was confirmed for ever: in addition to which this statute re-enacts all the provisions of the former act of this reign respecting settlements, the passing of vagrants, the providing for the infirm, and setting them to work, in the very words of

(a) Vid. ant. 225.

that statute, except the punishment of slavery. The direction about children was altered in this way: the child was to be brought into the open sessions by the apprehender, who was to promise to bring it up in honest labour till, if a woman, the age of fifteen; if a man, of eighteen; upon which the justices were to adjudge the child to be a servant, *according as the law and custom of the realm is of servants without wages*. If the child ran away, it was to be punished by the stocks, or at the master's discretion, who might also have a justice's warrant under the statute of labourers; and if any person inticed such child away, the master might have an action on the statute of labourers. Two neighbours might complain to the session if the child was maltreated, and the justices might discharge him from the service, and assign him to another master.

In the following parliament this matter was again taken up. By stat. 5 and 6 Ed. VI. c. 2. the stat. 22 Hen. VIII. c. 12. and stat. 3 and 4 Ed. VI. c. 16. were confirmed; subject, however, to the following corrections. The first of these amendments has more the appearance of a compulsory levy for support of the poor, than any thing we have yet met with. In cities, boroughs, and towns corporate, the mayor or head-officer, and in other parishes the vicar or curate and the churchwardens, were to have a register of the inhabitants and householders, and of the needy persons not able to support themselves; and with this, they were, in the church, quietly after divine service, to call together the inhabitants and householders, and elect and nominate out of them, yearly, two or more to be collectors of alms. These collectors, the Sunday following, while the people were at church, and had heard God's holy word, were gently to ask and demand of every man and woman, what they would be content to give weekly towards the relief of the poor, which was to be written in the register. After this, the collectors were to gather and distribute

such alms weekly to the poor for their support, or to put them to labour, as it seemed best. These collectors were to account to the principal persons beforementioned every quarter, at which any of the parish might be present; and when they went out of office, they were to deliver over all surplusses to the common chest of the church. If they refused to account, the ordinary might proceed against them with spiritual censures. If any refused to contribute, the parson, vicar, or curate, and churchwardens were gently to exhort him towards the relief of the poor: if he would not be persuaded, then, upon certificate of the parson, vicar, or curate, the bishop might send for him, and try to persuade him, and so, according to his discretion, take order for the reformation thereof.

In the next reign we find another act for the relief of the poor. By stat. 2 and 3 Ph. and Ma. c. 5. the two favourite statutes, 22 Hen. VIII. c. 12. and 3 and 4 Ed. VI. c. 16. were confirmed, and declared to be in full force; after which, this act goes on to exact the same provisions as had been made by stat. 5 and 6 Ed. VI. about appointing collectors, with their gathering, distribution, and accounts. To this it was now added, that if a parish was too small to support its own poor, then, upon certificate to the justices of the county, two of them, upon examination of the matter, might grant a licence under seal to such of the poor as they thought proper, to beg abroad. In towns, the chief officer was to exhort a wealthy parish to assist a poorer. If persons so licensed to beg exceeded the limit prescribed to them, they were to be punished as vagabonds, according to stat. 22 Hen. VIII. Such licensed persons were to have a badge on the breast, and back of the outer garment. This act was only temporary, and at the end of the first session of the next parliament it expired; so that the regulation of the poor, at the close of this reign, stood upon stat. 22 Hen. VIII. c. 12. stat. 3 and 4 Ed. VI. c. 16. and stat. 5 and 6 Ed. VI.

c. 2. and these were afterwards superseded by other regulations in the reign of queen Elizabeth.

For the better ordering of the military state, several provisions were made by statute in the reign of Ed. VI. respecting soldiers^(a) and musters; and some acts passed for maintaining in vigour and readiness the ancient militia^(b).

To take away temptations to idleness is the most effectual way of guarding against the increase of that order of people who are the objects of the foregoing laws. A law was made to lessen the number of tipling and gaming-houses. ~~Tippling and gaming-houses.~~ By stat. 5 and 6 Ed. VI. c. 25. two justices have authority to remove and put away the common selling of ale and beer in common alehouses and tipling-houses, in such towns and places as they thought meet. None were to keep such house, unless admitted and allowed in open sessions, or by two justices; and they were also to give a recognisance for not using unlawful games, and for the maintenance of good order and rule. This was to be certified to the sessions, where the justices might inquire by indictment, information, or otherwise, if such persons had broke their recognisance. Persons selling liquors without such authority, might be committed to gaol for three days, and till they entered into a recognisance not to keep any such house. The licences to keep gaming-houses, which were sanctioned, as we have seen, by the statutes of Hen. VIII. ^(c) were greatly abused, and became the source of much evil. To remedy this, it was enacted, by stat. 2 and 3 Ph. and Ma. c. 9. that every licence, placard, or grant, for the keeping any bowling-alley, dicing-house, or for other unlawful games, should be null and void.

The parliament were not inattentive to such objects as concerned the public weal, and improvement of the country. Among these, the first was agriculture. We find a

(a) Stat. 2 and 3 Ed. VI. c. 2. and stat. 4 and 5 Ph. and Ma. c. 3.

(b) Stat. 4 and 5 Ph. and Ma. c. 8.

(c) Vid. ant. 294.

statute of Edward VI. for the improvement of common and waste lands (a), in confirmation of the stat. of Merton, c. 4. and stat. West. 2. 13 Ed. I. (b) c. 46.; and further, all persons recovering in an assise on either of those statutes, were to have treble damages. It was however provided, that where houses had been built upon waste grounds, not having three acres inclosed, and an orchard, garden, or pond, not exceeding two acres, which did no hurt to the waste, and were a great convenience to the owner, they should not be considered as within the meaning of the above statutes. This proviso was in favour of husbandry and cultivation. The preferring of tillage to pasture, as had been done by former statutes, with the support of farm-houses, and other expedients for promoting husbandry, were insisted upon, and encouraged by several statutes (c).

The course of trade, and the conduct of manufactures, still continued to engage the notice of the legislature; but the number of acts about buying and selling; retaining servants and apprentices, are too tedious to make a part of our enquiry. The principal of these was stat. 5 and 6 Ed. VI. c. 14. which gives a definition, and directs the punishment, of certain offenders against the fair dealer, called ingrossers, forestallers, and regraters.

Among the regulations respecting trade, we may reckon the repeal of the stat. 37 Hen. VIII. c. 9. concerning usury. It is complained by stat. 5 and 6 Ed. VI. c. 20. that the former act had been construed to give a licence and sanction to all usury not exceeding ten per cent.; but this construction is declared to be utterly against scripture, and therefore all persons are forbid to lend, or forbear by any device, for any usury, increase, lucre, interest, or gain whatsoever, on pain of forfeiting the thing,

(a) Stat. 3 and 4 Ed. VI. c. 3. (b) Vid. ant. vol. I. 263, and vol. II. 209.

(c) Stat. 5 and 6 Ed. VI. c. 5. Stat. 2 and 3 Ph. and Ma. c. 2.

and the usury, or interest, and of being imprisoned and fined ; and so the law stood till the 13th of Elizabeth.

Respecting games and diversions, an act was made in the spirit of those in the time of Henry VIII. (*a*) about hand-guns, by which shooting hail-shot was prohibited absolutely (*b*), even to persons licensed to shoot by the former acts. On the other hand, a statute of Henry VIII. against the shooting of wild-fowl was repealed (*c*).

A proper administration of justice and of services of trust was promoted by an act against the sale of offices. This is stat. 5 and 6 Ed. VI. c. 16. which enacts, that if any person sell an office, or take any money or other profit, directly or indirectly, or any promise of it, for any office or deputation of office, or to the intent that any person shall have an office which concerns the administration or execution of justice ; the receipt, or comptrolment or payment of any of the king's treasure ; or surveying of any of the king's castles, manors, lands ; or any of the customs ; or the keeping of any of the king's towns, castles, or fortresses ; or any clerkship in a court of record ; the person so taking any reward or promise of reward for selling, shall be judged to lose and forfeit all right, interest, and estate, which he has in such office ; and the person making such offer to purchase, shall be deemed incapable to enjoy the said office : and all bargains, bonds, covenants, and agreements, concerning such a transaction, are declared void. This act, however, is not to extend to offices of inheritance ; nor to the parkership, or keeping of any park, house, manor, garden, chase, or forest ; nor to the chief-justices of the king's bench and common-pleas, nor to justices of assize ; who are left at the same liberty to dispose of offices as before this act.

Payment of
tythes.

Several regulations were made by stat. 2 and 3 Edward VI. c. 13. respecting the pay-

(*a*) Vid. ant. 293. (*b*) Stat. 2 and 3 Ed. VI. c. 14. (*c*) Stat. 3 and 4 Ed. VI. c. 7.

ment of tythes; all which contributed to secure the clergy in a more regular receipt of that inconvenient, though substantial and effective, provision. The act begins by confirming the stat. 27 Hen. VIII. c. 20. and 32 Hen. VIII. c. 7. (a) both made on the same subject, and with the same view. In order to further the intention of the makers of those two laws, it moreover enacts, that every one of the king's subjects shall truly and justly, without fraud or guile, set forth and pay his predial tythes, in their proper kind, as they rise and happen, in the manner they had been, or ought to have been paid for the last forty years before that act: and none shall carry away such tythes before he has set forth the tenth part, or agreed for it with the parson, vicar, or proprietor, under the penalty of forfeiting the treble value of the tythes so carried away. So far a temporal remedy in the secular courts is given for a breach of this duty. In the next clause of the act, a remedy is given in the spiritual court for the like injustice; for the act says, as often as the predial tythes shall be due, the party to whom they ought to be paid, or his deputy, may come and view them, to see that they are justly set forth. And if any person carry them away before they are set forth, or withdraw them; or prevent the parson, vicar, or proprietor, or their deputies, from viewing them, as beforementioned, by reason whereof the tythe is lost, impaired, or hurt; then, upon complaint to the spiritual judge, the party offending is to pay double the value of the tythes so taken, lost, withdrawn, or carried away, besides costs of suit.

These are the two general provisions relating to the collection of predial tythes: the remainder of this act is taken up with other matters incident to tythes of various kinds; all of which have been considered in a former part of this History (b). Persons (c) who depasture tythable cattle

(a) Vid. act. 222.

(b) Vid. ant. 25.

(c) Sect. 3.

in waste-grounds whereof the parish is not certainly known, are to pay the tithe of such cattle to the parson or proprietor of the parish, hamlet, or town, where they dwell. Waste-grounds which had paid no tythes before this act, by reason of their barrenness, were, at the end of seven years next after being fully improved, to pay tythe of corn and hay growing there (*a*). Every person exercising merchandize, bargaining and selling, clothing, handicraft, or other art or faculty, who had paid personal tythes within forty years before this act, is yearly, before Easter, to pay for his personal tythes the tenth part of his clear gains; his charges and expences, according to his estate, condition, or degree, to be therein abated and deducted. But these provisions were not meant to infringe either compositions real (*b*), or any custom by which handicrafts-men might have formerly paid their personal tythe (*c*). If any person refuse to pay his personal tythe, as above ordered, the ordinary may call him before him, and may examine him by all lawful means other than by his own corporal oath (*d*), concerning the true payment thereof.

Offerings and the tythes of fish are to be paid as heretofore, according to the custom of different places (*e*). It was provided, that the inhabitants of the city of London and Canterbury, with their suburbs, and every other town or place where they have been used to pay their tythe by their houses, shall not be taken as within the meaning of this act (*f*). A custom which had prevailed in Wales, of demanding a tythe of cattle and other goods given at the marriage of any one, was hereby abrogated (*g*).

The rest of this act concerns judicial proceedings for recovery of tythes. Suits for subtraction of tythes, or any of the beforementioned duties, are to be in the ecclesiastical court, and not before any other judge (*h*). Any

(*a*) Sect. 5.

(*b*) Ibid. 4.

(*c*) Ibid. 8.

(*d*) Vid. ant. 38.

(*e*) Sect. 10, 11.

(*f*) Ibid. 12.

(*g*) Ibid. 16.

(*h*) Ibid. 13.

party disobeying the ecclesiastical sentence may be excommunicated; and if he wilfully so remain for forty days after publication thereof in the parish-church or place where he dwells, the spiritual judge may signify the same to the king in chancery, and thereupon require process *de excommunicato capiendo*. That such suits may not be wantonly delayed by prohibitions, before any prohibition shall be granted, the party suing for it is to deliver to some of the judges of the court a true copy of the libel depending, and under the copy is to be written the suggestion; and if the suggestion is not proved by two honest and sufficient witnesses, within six months after the prohibition awarded, there is to go a consultation; and double costs and damages are to be recovered against the person suing the prohibition, to be assessed by the court granting the consultation. However, lest it might be imagined that the jurisdiction of the spiritual judge was intended to be hereby enlarged, it is provided that (a) he shall not hold plea of any thing contrary to stat. West. 2. 13 Ed. I. c. 5. *articuli cleri, circumspectè agatis; silva cædua*, the treatise *de regiâ prohibitionè*, or stat. 1 Ed. III. c. 10. (b) or of any matter which belongs to the king's court.

To protect the clergy in another instance, an act was made in the same sessions to moderate and qualify the penalty of deprivation from *all* their ecclesiastical preferment, inflicted by stat. 26 Hen. VIII. c. 3. on those who were certified by the collector not to have paid their tenths. It was now declared, by stat. 2 and 3 Ed. VI. c. 20. that such defaulter shall be deprived *ipso facto* of that only dignity, benefice, or other spiritual promotion, whereof the certificate shall be made; and they are no longer to be thereby disabled from enjoying any other benefice or preferment. The papistical piety of queen Mary dictated another application of tenths and first-fruits of ecclesiastical

(a) Sect. 15.

(b) Vid. ant. vol. II. 194. 215. 291. 375. 388.

preferments. They were by stat. 2 and 3 Ph. and Ma. c. 4. no longer to be paid to the queen; and the tenths before that paid according to stat. 26 Hen. VIII. c. 3. were to be employed to other godly purposes.

The statutes which next deserve our notice, are such as relate to certain special modes of redress; as the traverse of offices, the impounding of distresses, and the sale of stolen horses; after which will naturally follow such alterations and improvements as were made, during these two reigns, in the more general remedies, and the execution of justice.

Traverse of
offices.

The stat. 2 and 3 Ed. VI. c. 8. was made in favour of such persons as used sometimes to be precluded of their rights (a) by untrue finding of offices. As for instance, persons holding terms for years, or by copy of court-roll, were often put out of their possession by reason of inquisitions, or offices found before escheators, commissioners, and others, intitling the king to the wardship or custody of lands, or upon attainders for treason, felony, or otherwise; and this, because such terms for years and interests in copyhold were not found: after which they had no remedy, during the king's possession, either by traverse or *monstrans de droit*, because such interests were only chattels or customary hold, and not freehold. In like manner persons having any rent, common, office, fee, or other profit *apprendre*, if such interest were not found in the office intitling the king, they had no remedy by traverse, or other speedy means, without great and excessive charges, during the king's right therein. To redress these hardships on the subject, it is declared, that all persons in the above cases shall enjoy their rights and interests, the same as if no office or inquisition had been found, or as they might if their interest had been regularly found at the same time in such inquisition or office (b). Remedy was given where a person was found, untruly, to be heir of the king's tenant, and the

(a) Vid. ant. 231.

(b) Sect. 3.

like. And where a person is untruly found lunatic, ideot, or dead, and in some other cases, it is enacted, that the party grieved shall have a traverse, and proceed to trial therein; and have like advantages as in other cases of traverse upon untrue inquisitions and offices (a). The same of untrue finding, when a person is attainted of treason, felony, or *præmunire*, the party grieved may have a traverse, or *monstrans de droit*, without being driven to a petition of right (b). In all traverses taken according to this act, it is directed, that the person pursuing his traverse shall sue out a writ of *scire facias*, one or more, as the case shall require, against such person as shall have an interest either by the king or by his patentee, in like manner as upon traverses and petitions in other cases, with like pleas to the defendants in the *scire facias* (c).

The provisions of this act do not come into such common use as those of the following. The stat. 1 and 2 Phil. and Ma. c. 12. has made some regulations on a subject which had not been touched by the parliament since the reign of Edward I. (d). It is hereby enacted, that no distress shall be driven out of the hundred where it is taken, except to a pound overt, within the county, not above three miles distant from the place where it was taken: and no cattle or goods taken by distress at one time, are to be impounded in several places, whereby the owner shall be constrained to sue several replevins, under pain of an hundred shillings, and treble damages to the party grieved. Only four-pence is to be taken for poundage of one distress, under the penalty of 5l. For the more speedy delivery of cattle taken by distress, every sheriff, at his first county-day, or within two months next after he has received his patent of office, is to appoint, and proclaim in the shire-town, four deputies at the least, dwelling not above twelve miles from each other, who are to have authority, in his name, to make replevies, and deliverances of distresses, under the penalty of 5l. for

(a) Sect. 6. (b) Sect. 7. (c) Sect. 12. (d) Vid. ant. vol. II. 112.

every month that he neglects to make such appointment.

Sale of horses. The stat. 2 and 3 Ph. and Ma. c. 7. made some regulations respecting the sale of horses in fairs and markets, which were designed to prevent the disposal of stolen horses, and thereby put a check upon that offence. The complaint was, that such horses used to be sold in houses, stables, or some by-place, and the toll taken in private; "whereby the true owners," says the act, "were not able to try the falsehood and covin between the buyer and seller," and so were without remedy. It therefore enacts, That the owner, or chief keeper of every fair and market overt shall appoint a certain open place, within the town, where horses used to be sold at the time of the fair or market; in which place there shall be appointed a sufficient person to take toll from ten o'clock in the morning to sun-set, under pain of forty shillings. This toll-gatherer is to take such tolls as are due for horses at that place, between those hours, and *at no other time or place*; and is to have before him, at the time, the parties to the bargain, with the horse so sold; and shall write in a book, kept for that purpose, the names and place of abode of the parties, and the colour, *with one special mark* at the least, of the horse. This book is to be brought, the next day after the fair or market, to the owner or chief keeper thereof, who shall cause a note to be made of the number of horses sold, and subscribe his name, or set his mark to it.

It is moreover declared, that the sale in a fair or market overt of any horse that is thievishly stolen or feloniously taken, shall not alter the property, unless it be, during the time of the fair or market, openly ridden, walked, or kept standing for an hour at least, between ten o'clock in the morning and sunset, in the open place where horses are commonly used to be sold, and the contract be made in the above manner; and the owner may seize such horse, or bring an action of detinue or replevin for it. The justices in their sessions may inquire of all offences against this act.

Some further provisions of the like kind were afterwards made in the reign of queen Elizabeth (a).

We come now to such acts as were made to Administra-
promote a better administration of justice. It tion of justice.
was enacted by stat. 2 and 3 Ed. VI. c. 25. that whereas the
county courts in some shires were held from six weeks to
six weeks, and attornies, not aware of that private custom,
sued out process with like returns as if they were held
monthly, to the great delay and impediment of suitors, no
county-court shall be longer deferred than one month. In
order to quiet possessions, and facilitate the giving evidence
of titles, it is enacted by stat. 3 and 4 Ed. VI. c. 4. that, re-
specting all letters patent made since 4th Feb. 27 Hen.
VIII. a person may make title by way of declaration, plaint,
avowry, title, bar, or otherwise, to lands, honours, and
hereditaments, under the king's patentees, by shewing forth
an exemplification or *constat* of the letters patent, which
shall be of the same force and effect as the originals.

The process of the law was improved in one point by
stat. 1 Ed. VI. c. 10. The writs of proclamation ordained
by stat. 6 Hen. VIII. c. 4. (b) in cases of outlawry, were to
be directed to the sheriff of the county where the party lived;
but when the defendant lived in Wales, or a county-palatine,
they were made into the adjoining county. The present act
directs, that where a defendant dwells in Wales, or in the
county-palatine of Chester, or of the city of Chester, the
justices of the court shall have authority to award a writ
of proclamation to the sheriffs of those places: to them also
are to be directed (c) writs of *capias utlagatum*, as immedi-
ate officers of the king's bench and common-pleas. The
same was done by stat. 5 and 6 Ed. VI. c. 26. with respect
to the county-palatine of Lancaster. For receiving such
process, those sheriffs are required to have deputies in the
court of king's bench and common-pleas. As the statute

(a) Stat. 31 El. c. 12.

(b) Vid. ant. 261.

(c) Sect. 4.

of fines did not extend to the county-palatine of Chester, the same provision was made by stat. 2 and 3 Ed. VI. c. 28. to give effect to fines levied before the high-justice of Chester, or his deputy, as had been made in the last reign respecting fines in the county of Lancaster (a). By stat. 1 Ed. VI. c. 7. it is enacted, that no suit shall be discontinued by reason of the king's death; that the subsequent judicial process shall be made out in the style of the reigning king, and the variance in such process between the names of the kings shall not be error; that no assise of *novel disseisin*, of *mortauncestor*, *juris utrùm*, or attain, depending before the justices of assise, shall be discontinued by reason of death, new commission, association, or not coming of such justices; that though any plaintiff be made duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of the one bench or the other, or serjeant at law, no writ or action shall be abateable; and that a justice of assise, of gaol-delivery, or of the peace, or a person being in any other of the king's commissions whatsoever, though preferred to any of the above honours, shall yet remain justice and commissioner, and execute his commission as before.

Moreover it was enacted, that where a person is found guilty of any felony whatsoever, for which judgment of death should or may ensue, and shall be reprieved, without judgment, and committed to prison; any who shall be afterwards assigned justices to deliver that gaol, may give judgment of death, as the former justices might have done; and that no process or suit before justices of assise, gaol-delivery, *oyer* and *terminer*, of the peace, or other commissioners, shall be discontinued by the publishing of any new commission or association, or by altering the names of the justices or commissioners; but that the new justices and

(a) Vid. ant. 240.

other commissioners may proceed as if the old commission had still remained.

It was enacted by stat. 1 Ma. st. 2. c. 7. that all fines whereupon proclamation has not been duly had, by reason of the adjournment of the term, shall be of the same force under stat. 4 Hen. VII. c. 24. as if the term had been regularly holden. The stat. 35 Hen. VIII. c. 6. which gave a *tales de circumstantibus* to a plaintiff, was by stat. 4 and 5 Ph. and Ma. c. 7. extended to any issue to be tried between the king and a private party, or such as pursue any suit for the king and themselves; but such *tales* must be on the request of the king, or of the party suing *quis tam*.

An explanation was made of stat. 32 Hen. VIII. c. 2. (a) concerning the limitation of actions, as to certain cases, where it was often not possible, from the natural course of things, to lay the *esplees*, seisin, or presentment within sixty years. It was therefore declared by stat. 1 Ma. st. 2. c. 5. that that act should not extend to any writ of right of advowson, *quare impedit*, assise, *jure patronatus*, nor to any writ of right of ward, writ of ravishment of ward, for the wardship of the body, or of any honor, castle, or lands, nor to the seisor of such wardship.

In reviewing the changes made in our criminal law during these two reigns, we shall first go through the statutes of Edward VI. and then proceed to those of queen Mary. The criminal law was very materially affected by statutes made in the reign of Ed. VI. which we shall now mention in the order in which they were made. The statute of 1 Ed. VI. c. 12. makes a kind of date in the history of offences, by repealing many harsh laws, and making several beneficial provisions as well for the protection of the subject, as the punishment of delinquents. It is introduced by a preamble not unworthy of notice. Having said, "that on the part of a prince, the people should wish for

Criminal law.

(d) Vid. ant. 367.

“ clemency and indulgence, and rather too much forgiveness and remission of royal power and punishment, than exact severity and justice to be shewed; and that, on the part of the subject, he should rather obey for love, than strait laws; yet,” it goes on, “ sharper laws, as a harder bridle, should be made to stay those men and facts that might else give occasion of further inconvenience.” This consideration “ caused king Henry VIII. and other his progenitors to make statutes very *strait, sore, extreme, and terrible*, although then not without great consideration moved and established; and, for the time, to the avoidance of further inconvenience, very expedient and necessary. But as in tempest or winter, one course and garment is convenient; in calm or warm weather, a more liberal case or lighter garment both may and ought to be followed and used; so we have seen divers strait and sore laws made in one parliament (the time so requiring), in a more calm and quiet reign repealed. Which example the king being willing to follow, is contented and pleased that the severity of certain laws be mitigated and remitted.” It is

Repeal of
treasons and
felonies.

therefore ordained, that no act or deed being by statute made treason or petit-treason, shall be so deemed, but only such as are treason or petit-treason by stat. 25 Ed. III. st. 5. c. 2. and by this present act: and (a) all offences made felony by parliament since 23d April in the first year of Henry VIII. and all acts making such offences felony, are repealed: with the exception of all statutes concerning the counterfeiting of the coin of this realm, or of any other current within the realm; or concerning the bringing in of counterfeit money: nor was this repeal to extend to stat. 27 Hen. VIII. c. 2. (b) concerning those who counterfeited the king's sign manual, privy signet, or privy seal, their counsellors, aiders, and abettors (d); nor to stat. 27 Hen. VIII. c. 17. (d) concerning a servant embezzling his master's goods (c). It also declares, that in all cases of felony, except those mentioned (a) Sect. 4. (b) Vid. ant. 274. (c) Sect. 8. (d) Vid. ant. 283. (c) Sect. 18.

in this act, every one found guilty upon his arraignment, or who confesses, or stands mute, or will not answer directly, shall have his clergy (a).

It also repeals, as we have before observed, the statutes of Richard II. Henry V. and Henry VIII. against heretics: and after specifying these statutes by name, it repeals generally all acts of parliament concerning doctrine and matters of religion (b). It likewise repeals (c) stat. 34 Hen. VIII. c. 8. that proclamations made by advice of the council should be obeyed, as acts made by parliament; and stat. 34 and 35 Hen. VIII. c. 23. for the due execution of such proclamations.

So far this act is employed in repealing certain laws of a severe cast; the remainder of it is taken up either in enacting some new offences, or making some beneficial qualifications of criminal proceedings.

In the first place, it was ordained, if any person, by open preaching, express words or sayings, affirmed that the king was not, or ought not to be, supreme head of the church of England and Ireland, immediately under God; or, that the bishop of Rome, or any other person, was or ought to be by the laws of God supreme head of the same churches; or that the king was not king of England, France, and Ireland; or if any one did compass or imagine, by open preaching, express words or sayings, to depose the king from his estate, or deprive him of his titles; or did openly publish or say, that any person other than the king of right ought to be king; every such offender, his aiders or abettors, should for the first offence forfeit all his goods and chattels, and suffer imprisonment during the king's pleasure; for the second offence, forfeit the issues and profits of his lands, benefices, and other spiritual promotions, for life, with his goods and chattels, and be imprisoned during life; the third offence to be high-treason (d). If the above offences

(a) Sect. 10.

(b) Sect. 3.

(c) Sect. 5.

(d) Sect. 6.

were committed by writing, printing, overt deed, or act, it was high-treason for every offence (*a*). It was, besides, enacted, for confirming the succession established by stat. 35 Hen. VIII. c. 1. (*b*) that if any of the king's heirs, or persons to whom the crown was limited by that act, usurped the one of them upon the other, or interrupted the king in the quiet enjoyment of the crown, it should be adjudged high-treason.

After enacting the above treasons and offences, this statute takes away clergy from persons convicted or attainted of the following crimes : of murder of malice prepensed ; of poisoning of malice prepensed ; of breaking of any house by day or by night, any person being then in the same house where the breaking shall be committed, and thereby put in fear or dread ; for robbing of any person or persons in the highway, or near the highway ; or for felonious stealing of horses, geldings, or mares ; of felonious taking of any goods out of any parish-church, or other church or chapel. In all these cases clergy is taken away, if the party is found guilty by verdict or confession, or will not answer directly, or stands wilfully and maliciously mute (*c*).

For removing doubts and defining the extent of crimes, in two instances, it is declared (*d*) that concealment, or keeping secret any high-treason, shall be adjudged misprision of treason ; and that (*e*) all wilful killing by poisoning shall be deemed wilful murder of malice prepensed ; it having been declared high-treason in the former reign (*f*).

Some provisions are made respecting incidents of trials, and the like. It is declared, that the statutes made in the time of Henry VIII. and all clauses of statutes concerning challenge for the county, hundred, or peremptory challenge ; or concerning the trial of foreign pleas, pleaded by murderers, felons, or other offenders, shall remain in force (*g*) ;

(*a*) Sect. 7. (*b*) Vid. ant. 280. (*c*) Sect. 10. (*d*) Sect. 20.

(*e*) Sect. 13. (*f*) Vid. ant. 282. (*g*) Sect. 11.

which are stat. 35 Hen. VIII. c. 6. stat. 4 Hen. VIII. c. 2. stat. 22 Hen. VIII. c. 2. And wherever a common person may have his clergy, as a clerk convict who may make his purgation; and also in all cases where the privilege of clergy is taken away by this act (wilful murder and poisoning of malice prepensed only except); a lord of parliament and peer of the realm, having place and voice in parliament, by claiming the benefit of this act, though he cannot read, without any burning in the hand, loss of inheritance, or corruption of blood, is to be deemed, for the first time only, as a clerk convict who may make purgation (*a*); and such a person is to be tried for *any* of the offences limited in this act by his peers, as in cases of high-treason (*b*).

That the objection of bigamy might no longer be a cause for precluding any one from his privilege of clergy, it is declared, that persons who have been sundry times married to single women or widows, shall, notwithstanding, have this benefit (*c*); and that the wife of any one attainted, convicted, or outlawed of any treason, petit-treason, misprision of treason, murder, or felony, shall notwithstanding enjoy her dower; a point which had been attempted in former parliaments in cases of felony, but without success (*d*). The present act, as far as concerned treason, was repealed a few years after, as will be seen presently.

Finally, respecting prosecutions it was enacted, that no person should answer for any of the before-mentioned treasons, by open preaching of words only, unless he was thereof accused within thirty days after the open preaching or words spoken; the accusation to be made to one of the king's council, a justice of assise, or of the peace; and if the accusers happened to be out of the realm during the thirty days, then the party was to be accused within six

(*a*) Sect. 14. (*b*) Sect. 15. (*c*) Sect. 16. (*d*) Sect. 17. Vid. ant. vol. II. 467, 468.

months (a). Further it is enacted, that no one shall be indicted, condemned, or convicted for any treason, petit treason, misprision of treason, or for any words before specified, unless he be accused by two sufficient and lawful witnesses, or willingly, without violence, confess the same; concerning which last provision we shall say more hereafter.

At present we shall make a remark upon one article of that clause of the statute which takes away clergy from those House-break, who are convicted "of *breaking of any house by*

ing. "day or by night, any person being then in the "same house, and thereby put in fear and dread." These words, upon the face of them, appear to have enacted a nullity; for, as the breaking of a house by day or by night, though any body should be put in fear, is not in itself a felony, it stands in no need of clergy, and the taking it away is in effect inflicting no penalty at all; however, it is not to be supposed, that an act made upon such full consideration as this seems to have been, would have contained a sentence that was neither law nor sense, in so material a point as this; and whatever may be the modern construction of these words, they certainly, at the time, bore a meaning entirely consonant to the notions of law then prevailing. It is most probable, that the parliament here meant to take away clergy from *burglary*; the description of which offence, we have seen, was in early times very large, and was not yet contracted to the precise compass in which it now is: and at the time this act was made, that offence might, in the minds of some, be sufficiently described in the words of the statute. The breaking a house by day or by night was, as before appears, in the reign of Edward III. *burglary* (b), though nothing was taken; and, notwithstanding Fitzherbert, in his abridgment of that case, has said it must be *with an intent to take away goods*, that requisite

(a) Sect. 19. (b) 22 Ass. 95. Fitz. Cor. 264. Vid. ant. vol. III. 123, 124.

is not in the original report, but was added by himself, and might, perhaps, be only his own opinion, or at most only the opinion of his time. As to burglary being in the night only, the first determination, which expressly and finally says that it shall not be considered as such, unless the breaking be by night, is a case in 4 Ed. VI. three years after this act (a): if so, the breaking here described, without any thing more, comprehended a burglary as then understood; and probably the specifying whether by day or by night, was to obviate the doubts, which, most likely, long subsisted, before it was solemnly agreed that it must be by night,

But soon after this statute, this offence began to be more expressly settled and defined. After the determination in 4 Ed. VI, which confined it to the night, we find a writer of queen Mary's time expressly saying, that there must be a *felonious intent* to rob or murder; as also, that it must be in the *night* (b). When burglary was defined in this manner, the stat. 1 Ed. VI. c. 12. was defrauded, as it were, of its subject; and as the words no longer expressed any existing felony, they took away clergy from none. But that such a provision might not be vain and useless, the courts, to whom are given the oracles of the law, have since thought proper to supply by construction the defect which had thus accidentally been brought on the statute. They argued, that the *breaking a house by night*, here certainly meant, that *breaking and entering by night, with intent to commit felony*, which is now called burglary; and that, as breaking a house by day is in itself no felony, therefore the breaking here meant, is such a one as is attended with a *stealing* in a house after the breaking. In this manner were two crimes raised by construction in the place of one originally intended, upon

(a) Bro. Cor. 185.

(b) Staunf. lib. 1. c. 24.

which the statute might have its effect to take away clergy (a).

The next statute which enacts any penalties, is the act of uniformity, 2 and 3 Ed. VI. c. 1. which inflicts several punishments on offences against the book of common-prayer. Thus it is ordained, that if any minister refuse to make use of this book, or use any other, or shall preach or speak any thing in derogation of it, and shall be thereof convicted by verdict, by his own confession, or by *the notorious evidence of the fact (b)*, he shall forfeit the profits of such of his spiritual benefices as the king pleases, for a whole year, and suffer imprisonment for six months; for the second offence, shall be deprived *ipso facto* of all his spiritual promotions, and be imprisoned a whole year; and for the third offence, be imprisoned during life. And if he has no benefice or spiritual promotion, he shall for the first offence be imprisoned for six months; and for the second offence, during life. So far of the clergy.

Again, if *any person whatsoever* shall, in any interludes, plays, songs, rhimes, or by other open words, speak any thing in derogation of this book; or shall, by open fact or open threatenings, compel or procure any minister in any cathedral or church to sing or say any prayers, or minister any sacrament otherwise than in this book; or shall interrupt any minister in such singing, saying, or ministering, he is to forfeit for the first offence 10*l.*; for the second offence, 20*l.*; for the third offence, all his goods and chattels, and to be imprisoned during life: and if the 10*l.* is not paid in six weeks after conviction, he is to be imprisoned for three months; and if the 20*l.* is not paid in

(a) The statutes which take away clergy from *burglary*, and from *larceny in a house, with a breaking*, and *without a breaking*, create much confusion. I have attempted to represent their distinct offices in a plain and obvious manner in the *Chart of Penal Law*.

(b) We have before seen, that this was legal evidence in the canon law. Vid. ant. 24.

the same time, he is to be imprisoned for six months instead thereof: all these offences to be determined either at the assizes or sessions, with liberty to every archbishop or bishop to be associated to the justices. The indictment must be at the next sessions or assize; and the lords of parliament are to be tried for these offences by their peers. The jurisdiction of bishops is not hereby taken away; but they are to inquire and punish such offenders by ecclesiastical censures, so, however, as no one be punished both by the spiritual and temporal court for the same fact.

The next penal statute was 2 and 3 Ed. VI. c. 5. ^{Unlawful assemblies.} against unlawful assemblies; an act which was occasioned by the late riots in many parts of England, and which provided some very heavy penalties to prevent the like disorders. It was made high-treason for twelve persons or more, being assembled together, to attempt to kill or imprison any of the king's council; or to alter any laws; and to continue together for the space of an hour, being commanded by a justice of peace, mayor, sheriff, or the like, to depart. It was made felony for twelve persons to practise to destroy any park, pond, conduit, or dove-house; or to have common or way in any ground; or to pull down any houses, barns, or mills; or to burn any stack of corn; or to abate the rents of any lands, or the prices of victual; and to continue together an hour, being commanded in like manner to depart. Concerning the provisions of this act, we shall have occasion to speak in the next reign. By c. 15. of the same statute, the publishing any false prophecy upon occasion of arms, fields, and the like, to the intent to make dissension, was to be punished for the first offence, by one year's imprisonment, and the forfeiture of 10l.; for the second offence, by forfeiture of all the party's goods, and imprisonment during life. Both these acts, being temporary, were left to expire in a few years. The remainder of the criminal acts passed in this reign are, the 9th, 10th, and 11th chapters

of stat. 5 and 6 Ed. VI. These are very material laws, and come now under consideration. We shall begin with the last, concerning treason.

This statute enacts certain treasons of the same kind with some made in the reign of Henry VIII. ; however, with such qualifications as discover more temper and moderation. If any person by open preaching, express words or sayings, affirmed that the king, or his heirs, or successors, as appointed by stat. 35 Hen. VIII. c. 1. (being in possession of the crown) was a heretic, schismatic, tyrant, infidel, or usurper, he was for the first offence, to forfeit all his goods and chattels, and to be imprisoned during the king's pleasure ; for the second offence, to lose the issues and profits of his lands during life, and of all spiritual promotions, and suffer perpetual imprisonment ; and for the third offence, he was to be adjudged a traitor. But if the same offence was committed by writing, printing, painting, carving, or graving, it was made high-treason in the first instance. It was also enacted, that if any person rebelliously withheld any of the king's castles, fortresses, or holds, or his ships, ordnance, artillery, or other munitions of war, and did not give them up within six days after proclamation, it should be high-treason. It was also provided, in pursuance of stat. 26 Hen. VIII. c. 13. and stat. 35 Hen. VIII. c. 2. (a) that such treasons, if committed out of the realm, should be tried by commission in any county ; and outlawry pronounced against such offender, though out of the realm at the time, was to be valid ; to which it was now added by this statute, that if such person should within a year after the outlawry pronounced surrender himself to the chief-justice of England, and offer to traverse the indictment, he shall be received so to do ; and if he is acquitted by verdict, he shall be discharged from the outlawry and all its forfeitures.

Persons who committed the above offences by open preachings or words, must have been accused within three

(a) Vid. ant. 299.

months. It is moreover declared, generally, that persons ~~convict~~ of high-treason shall forfeit all lands and tenements in which they have an estate of inheritance; and, in repeal of stat. 1 Ed. VI. c. 12. sect. 17. that wives whose husbands have been attainted of treason shall not have dower (a).

The rest of this statute is much in favour of the subject. There is a clause concerning misprision of treason, similar to that in stat. 1 Ed. VI. c. 12.; but the present, by the particular wording of it, evidently shews what was the design of these repeated declarations on this point: for the act says, that the concealment or keeping secret of any high-treason shall be deemed and taken *only* misprision of treason; by which it was intended so far to set a limit to constructive treasons. The next clause contains a wise provision concerning witnesses on trials; and is thought to have been made in consequence of what passed on the late trial of the duke of Somerset, when the oppression attending a contrary way of proceeding had excited a general indignation. It enacts, that no person shall be indicted, arraigned, condemned, convicted, or attainted, for any treason that now is, or hereafter shall be, unless he be thereof accused by two lawful accusers; which, so far, seems to be little more than had been ordained by stat. 1 Ed. VI. c. 12. But this statute goes further: it directs, that such "accusers, at the time of the arraignment of "the party accused, if they be then living, shall be brought "in person before the party so accused, and avow and "maintain That that they have to say against the party "to prove him guilty, unless he shall willingly, without "violence, confess the same." The particular meaning of this and the other statute of this king, with their effect and consequences, will be considered, when we speak of the statute of Philip and Mary which was supposed to have repealed them.

The stat. 5 and 6 Ed. VI. c. 9. next comes Robbing in a booth or tent.
under consideration. This act was made to ex-

(a) Vid. ant. 471.

plain the stat. 23 Hen. VIII. c. 1. (a) upon which there had arisen three doubts: 1st, whether the owner or dweller must not be in the very chamber where the robbery was committed; a doubt that arose from a strict adherence to the notion of a proper robbery, where the taking must be in the presence of the person robbed: 2dly, whether the offender would lose his clergy if the owner or dweller was asleep; apprehending, probably, that in that state he could not be said to be put in fear, according to the requisite of the statute; 3dly, whether a booth or tent in a fair or market, in which dealers used to dwell and sleep during the continuance of such fairs, could be considered as a dwelling-house under that statute. To remove these doubts, it was declared and enacted, that any person found guilty for robbing of a person in any part or parcel of their dwelling-houses or dwelling-places, the owner or dweller in the same house, or his wife, his children, or servants, being then within the same house or place, where the robbery and felony shall happen to be committed and done, or in any other place within the precinct of the same house or dwelling-place, shall in no wise be admitted to his clergy, whether the owner or dweller in the same house, his wife and children then and there being, shall be sleeping or waking. Further, that any one found guilty of robbing a person in a booth or tent in a fair or market, the owner, his wife, his children, or servants, or servant, then being within the same booth or tent, shall not be admitted to the benefit of his clergy; but shall suffer death *in such manner as is mentioned in stat. 23 Hen. VIII. c. 1.* for robberies done in dwelling-houses, without any consideration whether the owner or dweller in such booths or tents, his wife, children, or servants, being in the same booths, be sleeping or waking. The latter part of this act is stated in this particular manner, because, as we shall presently see, there have arisen great doubts whether this stat. 23 Hen. VIII. c. 1. (or at least stat. 25 Hen. VIII. c. 3.

(a) Vid. ant. 286.

which is a supplement to it) be now in force; which, upon the present appearance of things in the course of this History, must be answered in the negative; as they were, among other statutes taking away clergy, repealed by stat. 1 Ed. VI. c. 12. s. 10. as we have before seen.

But as the doubt concerning these statutes arises upon the next act, namely, stat. 5 and 6. ^{Of the revivor of statute} Ed. VI. c. 10. we shall proceed to examine that. ^{25 Hen. VIII.}

The preamble recites, that stat. 23 Hen. VIII. c. 1. had taken clergy away in certain robberies and burglaries; but extended only to those who were convicted in the county where the fact was committed; and as such felons often carried their spoil into another county, and if they were indicted there for the simple larceny, they had their clergy; that it was for these reasons enacted, by stat. 25 Hen. VIII. c. 3. (a) that they should lose their clergy, as if indicted in the same county where the robbery or burglary was committed. Then it recites, that stat. 25 Hen. VIII. was repealed by a clause in stat. 1 Ed. VI. and that since offenders of this kind had enjoyed their former impunity; for redress whereof this statute now enacted, "that the said stat. 25 Hen. VIII. c. 3. touching the putting of such offenders from their clergy; and every article, clause, or sentence, in the same, touching clergy, should from thenceforth, touching such offences, remain, and be in full force, in such manner and form as it was before the making of stat. 1 Ed. VI. c. 12." This is the effect of stat. 5 and 6 Ed. VI. c. 10.

It became in after-times a question, founded upon the operation of this statute, whether the whole of stat. 25 Hen. VIII. c. 3. and also stat. 23 Hen. VIII. c. 1. were not thereby revived. The occasion of this question was as follows. A man was indicted (b) for wilful burning of a house. This offence, among others, was deprived of clergy by stat. 23 Hen. VIII. c. 1. which extended to

(a) Vid. ant. 317.

(b) Powlter's Case, 10 Rep.

principals and accessaries before the fact being convicted by verdict or confession; but did not reach the case of persons wilfully standing mute, and the like: to remedy which defect, stat. 25 Hen. VIII. c. 9. s. 2. ousted of their clergy such offenders in those cases; and after that, made the provision we have before rehearsed concerning persons indicted in one county for goods taken by robbery or burglary in another. Then came stat. 1 Ed. VI. c. 12. s. 10. which took away clergy from all felonies except those enumerated in the act. These are for the most part such as were before deprived of clergy by stat. 23 Hen. VIII.; but there is no mention of *wilful burning of houses*, nor of accessaries before the fact. Therefore, as stat. 23 Hen. VIII. and 25 Hen. VIII. were repealed, and stat. 1 Ed. VI. c. 12. had not provided for burning of houses, it was a doubt in the case abovementioned, by what existing law the offender was ousted of his clergy. It was there contended (and that seems to have been the opinion of *lord Coke*), that this stat. 5 and 6 Ed. VI. c. 10. revived *the whole* of stat. 25 Hen. VIII. and consequently, that wilful burning being named in the first clause among the offences enumerated in stat. 23 Hen. VIII. is ousted by the general words, *every article, clause, or sentence, contained in the same concerning clergy*. However, others (*a*) are of opinion, that, general as these words may seem, they must be restrained to that particular mischief, which, it appears by the preamble, was alone in contemplation to be remedied: and some (*b*) remark, very justly, that the enacting clause in the latter part of it restrains these general words, so much relied on by *lord Coke*, to *such offences* as are stated in the preamble.

But there was another ground of argument in the case beforementioned, on which, *lord Coke* says, some of the judges relied. The stat. 1 Ed. VI. c. 12. having taken away clergy only from principals, the stat. 4 and 5 Ph. and

(*a*) Among whom are *lord Hale* and *sir Michael Foster*.

(*b*) Namely, *sir Michael Foster*.

Ma. c. 4. was made to take it away from accessaries before in the same offences; but this statute, moreover, takes it away from accessaries before *in wilful burning*. Now some of the judges, says lord Coke, thought this solved the difficulty, and gave an interpretation to the former acts. For if the principal should have his clergy, it would be absurd, and what was never seen in our law, that clergy should be taken from the accessory; and secondly, it would be in vain to take away clergy from the accessory, and leave the principal to have his clergy; for if the principal had his clergy before judgment, the accessory should not be arraigned. And this *sir Michael Foster* thinks was the real ground upon which that determination rested: so that, upon the whole, ~~the~~ ^{he} is of opinion, that both 23 and 25 Hen. VIII. were repealed by stat. 1 Ed. VI; that the stat. 5 and 6 Ed. VI. c. 10. revived stat. 25 Hen. VIII. only *in part*, for the purpose therein mentioned; that therefore, both stat. 23 and stat. 25 Hen. VIII. continue otherwise repealed; and that the stat. 4 and 5 Ph. and Ma. put the matter out of doubt with regard to *arson* (a).

Whatever ingenuity there may be in this way of reconciling the repugnance of statutes *when they are made*, and allowing this to be a probable inference from the stat. 4 and 5 Ph. and Ma.; yet it is very difficult to imagine, that the legislature, having in contemplation to take away clergy from *principals*, should take it only from *accessaries* expressly, and leave it to legal construction to make the same conclusion as to *principals*; a method hardly suitable to the precision and determination of a legislative act. When we look back to the form and history of these statutes, we find a want of consistency in the parliament at different times, which only increases the obscurity. The stat. 5 and 6 Ed. VI. c. 9. seems, from the language of

(a) *Fost.* 331 to 336.

it, to consider the stat. 23 Hen. VIII. as still in force; for it says, it *hath been* doubted respecting that statute in some points, and therefore provides for the explanation of those doubts: whereas, had that statute been looked on as repealed; if any doubts upon it had been thought worthy a parliamentary exposition; or rather, if it had been thought proper to re-enact any of its provisions; that statute, it should seem, would have been spoken of in another tense; namely, that it *had been* doubted. If the parliament entertained an opinion that stat. 23 Hen. VIII. was then in force, it must have been founded on the next chapter of stat. 5 and 6 Ed. VI.; which being thought to revive *in toto* stat. 23 Hen. VIII. (an act supplementary to stat. 23 Hen. VIII.) thereby also revived stat. 23 Hen. VIII. which opinion we have above seen was held by lord Coke many years after. Nor is it any objection to this supposition, that the reviving statute of 5 and 6 Edward VI. is placed in the statute-book subsequent to the explanatory act (a); as there are many instances in this reign where acts that are later in point of time, are placed before former acts of the same session (b).

However the parliament might have formed their opinion on this point at the time, they soon afterwards thought differently; for early in the next reign it will be seen, there happened a case which called upon them to make, as it were, a decision on this question. They passed a special act for the purpose of taking away clergy from an accessory before the fact in murder; which offenders, as we have seen, are not deprived of that privilege by stat. 1 Ed. VI. c. 12.; and they thereby seemed to declare, that stat. 23 Hen. VIII. which had provided for this case, was not then in force. Pursuing the same idea, the legislature made an act some few years after, by stat. 4 and 5

(a) Cap. 9. and cap. 10.

(b) Stat. 5 and 6 Ed. VI. c. 3. of holidays and fasts, was introduced and passed both houses before the act of uniformity, cap. 1.

Ph. and Ma. to take away clergy from accessaries before in all the offences where it was taken from principals by stat. 1 Ed. VI. c. 12. and also from accessaries in arson; in which this statute is very particular: for though it was intended evidently as a supplement to stat. 1 Ed. VI. yet it rather deviated from that, and pursued the words of stat. 23 Hen. VIII. which was at the same time regarded as a law not then in force; and by taking clergy from accessaries in arson, when no statute in force took it from the principals, created the above-mentioned doubt; and at length furnished, as it is thought, the resolution of it. Thus, in every point of view, these statutes are involved in obscurity; and the main and only question which renders the discussion of the point interesting, can be solved no otherwise than by the assistance of refinement and conjecture.

To return to the order of time from which we have digressed, namely, stat. 5 and 6 Ed. VI. ^{Trial of felons in foreign countries.} c. 10. of persons committing a burglary or robbery in one county, and flying with the thing stolen into another; which leads us to mention another act made for the like furtherance of criminal justice, and the removal of like impediments: this was stat. 3 and 3 Ed. VI. c. 24. The preamble of the act states two defects of the law. First, that where a person, who was feloniously struck in one county, died in another, a lawful indictment could not be taken in either; for the jurors of the county where he was struck, could take no knowledge of the death; nor could those where the death happened, for the same reason, take cognizance of the stroke: so that there was no way of punishing such offenders, neither by indictment, nor, as the statute says, by appeal. The second was, where thieves who had robbed or stolen in one county, conveyed their plunder into another: in which case, though the principal was attainted in one county, yet the jurors of the other could take no cognizance of such attainder; and therefore the accessory

went unpunished. It appears, by a case mentioned in the last reign (a), that the second defect here stated was an obstacle to justice; and however they might *try* a robbery, or murder, which was not complete in either county, by a jury of two; and though an *indictment* might be found of such *stealing*; yet there is no case which had yet warranted an *indictment* of *killing*, where the stroke was in one county, and the death in another; but there is an express determination in the reign of Henry VII. that though such a murder might be prosecuted by appeal, it could not by indictment (b). To remedy these defects, and remove all doubt, it was enacted, as to the first, that the jurors of the county where the death happens, may enquire, and an appeal may be brought, of the stroke in another; and in the second case, that an indictment against an accessory shall be as valid as if the principal offence had been committed within the same county. The commissioners before whom the indictment is taken, are to write to the *custos rotulorum* where the principal was attainted or convicted, to certify whether he was attainted, convicted, or otherwise discharged; which certificate is to be under the seal of the *custos rotulorum*; and upon the receipt of it, the justices are to proceed against the accessory, as if the principal offence had been committed in that county.

Some few other statutes were made concerning crimes and punishments. The stat. 25 Hen. VIII. c. 6. making sodomy felony without clergy, being repealed by the general clause of stat. 1 Ed. VI. c. 12. was revived by stat. 2 and 3 Ed. VI. c. 29. And because it had been doubted whether the clause of stat. 1 Ed. VI. c. 12. which takes clergy from those stealing horses, geldings, or mares, inflicted the same penalty on those who stole one horse, gelding, or mare; it was declared by stat. 2 and 3 Ed. VI.

(a) Vid. ant. 697.

(b) Vid. ant. 178. 394.

c. 39. that it should. This singular scruple was entertained in consideration of this being a penal law, but the like had never been countenanced in cases regarding property; for the statute of Gloucester, giving an action of waste against one who holds for a term of years, had always been construed to extend to a holding for a year (a).

There was a law made to punish offences committed in churches and church-yards by riotous and outrageous quarrels, as then often happened between the reformed and those of the ancient religion. Such offenders are considered in three different lights by this act, and differently punished. First, it is enacted by stat. 5 and 6 Ed. VI. c. 4. if any person, by words only, quarrel, chide, or brawl in any church or church-yard, he shall, if the offence be proved by two lawful witnesses, be suspended, if a lay man, *ab ingressu ecclesie*; if a clerk, from the ministration of his office, at the discretion of the ordinary. Secondly, if any one smite, or lay violent hands upon another, he shall be deemed *ipso facto* excommunicate. And thirdly, if any maliciously strike with a weapon, or draw a weapon to the intent to strike such person, and be convicted by verdict of twelve men, or his own confession, or by *two lawful witnesses*, before the justices of assize, of oyer and terminer, or of the peace, in their sessions, he shall have his ears cut off; and if he has no ears, says the statute, he shall be marked in the cheek with a red-hot iron having the letter *F* therein, that he may be known for a *fray-maker and a fighter*; and shall moreover be deemed *ipso facto* excommunicate.

Before we quit this subject of penal law, it will be proper to mention a provision made at the beginning of this reign with regard to clerks convicted, which punished vagrancy, as we have before seen, with slavery. It was enacted by stat. 1 Ed. VI. c. 3. that no clerk convict should

(a) Plowd. 467.

make his purgation, but should be a *slave* for one year to him who would become bound, with two sureties, in 20l. to the ordinary, to the king's use, to take him into service; and he was then to be treated as vagabonds were directed by that act to be treated in the like case. Again, a clerk attainted or convict, who by law could not make his purgation, might be delivered by the ordinary to any man who would become bound, with two sufficient sureties, to keep him as his slave five years, to be used as a vagabond; and every person to whom such a one was adjudged slave, might put a ring of iron about his neck, arm, or leg. This extravagant punishment, especially under so hateful an appellation as that of slavery, was ill borne by the spirit of the nation; and was therefore repealed by stat. 3 and 4 Ed. VI. c. 16. as has been before related.

Repeal of treason, felony, and time of queen Mary's accession, when a statute preamble. This was the state of our criminal law at the time of queen Mary's accession, when a statute was made similar to that passed at the beginning of Edward VI.'s reign, to abolish all new-created treasons and felonies; though the repealing act of Edward VI. and the mildness of that reign, had left very little occasion for such a statute. However, such a beginning had some small effect in conciliating the minds of the nation to her government, till another spirit could with more safety discover itself. The preamble of the act, in stating a reason for making it, seems to glance at stat. 5 and 6 Ed. VI. c. 11. For it says, that "many honourable and noble persons have of late (*for words only, without other opinion, fact, or deed*) suffered shameful death, not accustomed to nobles: to remove the occasion of which in future, the queen was "pleased" that no act, deed, or offence, being made treason, petit-treason, or misprision of treason, by writing, cyphering, deeds, or otherwise, shall be so deemed, but only such as is so declared by stat. 25 Ed. III. And again, that all offences made felony (not being felony before), or

appointed to be within the case of *præmunire*, by any act made since the first day of Henry VIII.'s reign, shall be repealed and void.

Thus was the description of treason once more reduced to the words of the statute of Edward III. and the few felonies made in the last reign were abolished. But, notwithstanding this appearance of clemency, some treasons and felonies were very soon enacted by parliament. In the next sessions of that same parliament, it was ordained by stat. 1 Ma. st. 2. c. 6. in protection of a species of coin for which no law had before provided, that persons who counterfeited gold or silver coin, not the proper coin of this realm, but current with the queen's consent (and by stat. 1 and 2 Ph. and Ma. c. 11. those who bring such coin into the realm) shall be adjudged traitors; as also those who counterfeit the queen's sign manual, privy signet, or privy seal; for the statute of Henry VIII concerning these seals was repealed by the general clause of the former law.

In the same session an act was made against ^{Riotous} riotous assemblies, and to repeal the law made ^{assemblies.} for the like purpose in the last reign (a). This is stat. 1 Ma. st. 2. c. 12. which together with that of Edward VI. deserves notice, as they furnished a model for a similar one made in later times; with this difference, that those of Edward and Mary inflicted only the penalty of single felony, that of George I. of felony without clergy. The act in question declares it felony for any persons to the number of twelve, being assembled together, to intend, or go about with force and arms, and of their own authority, to change any laws; and, being commanded by the sheriff, or by any justice of the peace, mayor, or bailiff of any town or city, by proclamation in the queen's name, to retire to their houses, to continue together for one hour after such commandment, or to attempt any of the above-mentioned facts;

(a) Vid. ant. 475.

and if persons to the number of twelve should go about to overthrow pales, hedges, ditches, or other inclosures, the banks of any fish-pond or conduits for water, to the intent the same should lie open; or to have common there; or to destroy deer or conies; or to pull down any houses, barns, mills; or to burn any stacks of corn; or to abate rents of lands or price of victuals, and should refuse in like manner to depart after proclamation, it was made felony. The raising of people to the number of twelve, by ringing of bells, sound of trumpet, or in any way, was likewise made felony, if the persons so met together came within the former clauses of the act; and if the *wife*, servant, or any other relieved any persons, so assembled, with *victuals*, weapons, or other things, they were to be deemed felons. Thus far of riots committed by twelve persons. If the like offences were committed by persons above the number of two, and under that of twelve, they were to be imprisoned for one year: and finally, it was ordained, in a more comprehensive manner, that if persons to the number of forty assembled for the above purposes, or to do *any other felony or rebellion*, and so continued together for three hours after proclamation, they should be adjudged felons: and any copyholder or farmer being required by the king's officer to assist in suppressing such offenders, and refusing so to do, was to forfeit his copyhold or lease during his life. This act was only temporary, and soon expired.

Some other of the penal laws of this reign were only temporary, and expired at the demise of the crown. Such was stat. 1 and 2 Ph. and Ma. c. 3. concerning reporters of news. The execution of stat. 3 Ed. I. c. 34. and 2. Ric. II. st. 1. c. 5. was thereby referred to justices of the peace; and it was moreover enacted, that any person convicted of speaking maliciously any slanderous news of the king or queen, should, for the first offence, be set in the pillory, and have both his ears cut off (unless he paid 100l.) and suffer three months imprisonment; and if slanderous

news were spoken of any common person, there was the same punishment, except that the imprisonment was to be only for one month; and if it was by book, rhyme, ballad, letter, or writing, the offender was to have his right hand stricken off; and for the second offence, he was to suffer imprisonment during life, and forfeiture of all his goods. The queen's jealousy of offenders of this kind was such, that an act was made in the same session (a) which declared, that "persons who *have* by express words *prayed*, or here-
" after shall pray, that God would shorten the queen's
" days, or take her out of the way (as the conventiclers
" in Loudon were then said to have done), should be deemed
" traitors;" but with respect to offenders who had committed this crime during that session of parliament, and were indicted, such persons might, upon their arraignment, submit themselves to the queen's mercy, and then no judgment was to be passed; which *proviso* took off the edge, in some degree, of this *ex post facto* law.

But the next act (b), of the same session, went further; for, complaining that "the late clemency of the queen, in
" relaxing penal laws, had given occasion to many *cankard*
" and traitorous hearts to imagine and attempt things
" against the government;" some provisions were now again made in the spirit of several acts of (c) Henry VIII. and of one in the late reign. If any, by open preaching, express words or sayings, did compass or imagine to deprive the king of his stile and honour, or to destroy him; or to levy war against the king and queen; or did maliciously or advisedly say that the king ought not to have such title and stile; such offender was to forfeit all his goods and issues of his lands during life, with perpetual imprisonment; and for a second offence, he was to be adjudged a traitor. To do the same by writing, printing, overt deed, or act, was made

(a) Cap. 9.

(b) Cap. 9.

(c) Vid. ant. 273, 274, 469.

high-treason in the first instance. There is another treason made to protect the king's person, if he should survive the queen, and continue governor to the child of which the queen was then supposed to be pregnant. This act contains two clauses concerning trials for treason, which we shall hereafter mention. It requires that indictments for words, under this act, should be brought within six months; and now again declares, what had been twice decided by statutes in the reign of Edward VI. that concealment of high-treason shall only be misprision of treason.

These are all the penal statutes made respecting the government; in which we see more caution and moderation than in those of Henry VIII. from which they were copied, though they went a little further than those on the like subject in the reign of Edward VI. The remaining statutes regarded common offences; and were, one concerning Egyptians, another respecting accessories in certain felonies, and the last about the stealing of maidens.

Punishment of Egyptians. The statute of Henry VIII. (a) made against Egyptians, or gypsies, was found not strict enough to restrain those people from coming into the kingdom; but many still resorted hither, using, as the present act says, "their old accustomed devilish and naughty practices and devices, with such abominable living as is not in any Christian realm to be permitted, named, or known." It is therefore enacted, by stat. 1 and 2 Ph. and Ma. c. 4. that any one conveying such person into the realm, shall forfeit 40l.; and the Egyptian so conveyed, and continuing here one month, shall be adjudged a felon without benefit of clergy or sanctuary. As to those within the realm, such as do not depart within twenty days after proclamation of that act, shall forfeit all their goods, to be seized by any one; half to the king, and half to the party seizing them: and if they do not depart in forty days after the proclamation, it is

(a) Vid. ant. 290.

made felony without clergy or sanctuary. Persons who leave that way of life within the twenty days above-mentioned, are to be discharged of the penalties of the act.

Stat. 4 and 5 Ph. and Ma. c. 4. to which we have before alluded, takes away clergy from accessaries before the fact, in the following offences: in petit-treason; wilful murder; robbery in any dwelling-house or houses, robbery in or near any highway; the wilful burning of any dwelling-house, or any part thereof, or any barn, then having corn or grain in the same. Clergy is taken from all these offenders, being outlawed, or being otherwise attainted or convicted, or standing mute of malice, or challenging peremptorily above twenty persons, or not answering directly to the offence. This act was made as a supplement to stat. 1 Ed. VI. c. 12. which had taken away clergy from the principals in all these crimes. But in addition to the statute of Edward VI. this act provides for the case of *burning of houses*, which that act had omitted. The arguments and consequences which have been founded on this particular circumstance, have been fully considered before (a).

To this statute is added a clause, which is to be found in several laws of these two reigns, that lords of parliament and peers shall be tried by their peers, for any offence mentioned in this act, as hath been accustomed by the laws of the realm; a caution which probably was occasioned by some doubt then subsisting, whether that privilege was allowed in new-made felonies and treasons; though one should think it was sufficiently secured by the terms of *Magna Charta* (b).

The stat. 4 and 5 Ph. and Ma. c. 8. was intended to carry further the policy of the statute of Henry VII. (c) respecting the stealing of heiresses. As that act

Stealing of
women.

(a) Vid. ant. 480, 481.

(b) *Nullus liber homo, &c. &c. nisi per iudicium parium suorum*, ca. 29. Vid. ant. vol. I. 249.

(c) Vid. ant. 145.

only punished a man who committed such an act against the consent of the woman; this statute was to restrain the like indecorum, even in some instances where she did consent. It is enacted, that if any person above the age of fourteen years shall unlawfully convey, or cause to be conveyed away, any woman-child unmarried, within the age of sixteen years, out of the possession, and against the will of her father or mother, or of such person as then shall happen to have by any lawful means the order, keeping, education, or governance of any such child, he shall suffer two years imprisonment, or else pay a fine, to be assessed in the star-chamber.

Again, if such person shall so deflower such woman-child, or by secret letters, messages, or otherwise, contract matrimony with her (except with consent of such as have title of wardship), he shall suffer imprisonment for five years, or else pay a fine, to be assessed in the star-chamber; one moiety to the king, the other to the party grieved. Besides this, it was provided, that if any woman-child, above the age of twelve, and under sixteen years, consent to such contract, then the next of kin, to whom the inheritance shall come after her decease, shall immediately enjoy all her lands in possession, reversion, or remainder; during the life of such person as shall so contract matrimony. The offences herein described are to be heard and determined in the star-chamber on a bill of complaint or information, and before the justices of assize by inquisition or indictment.

These are all the statutes which were made concerning crimes in the reign of queen Mary and her consort. It remains now to speak of such as regarded the method of bringing offenders to justice, and what had been ordained in these two reigns respecting witnesses, particularly in trials of treason.

Of bail.

We have seen that the first statute which empowered justices of the peace out of sessions to

let to bail, was the statute of Richard III. (a) This was intended in relief of the subject against malicious imprisonment upon slight accusations ; but as this authority was entrusted only to one justice, it was thought proper by stat. 3 Hen. VII. c. 3: to repeal this act, and give the same jurisdiction to *two at least*, one to be of the *quorum*, who were to bail persons mainprizable by law till the sessions or gaol-delivery, and to certify thither such bail, under the penalty of 10l. However, the restrictions of this statute had been disregarded, and the authority to let persons to bail had been abused. For though the act requires two justices at least to discharge this office, it became usual for one to take the bail, and insert the name of a brother justice, who was seldom present. By this practice, the business was conducted neither with the solemnity nor caution which was required ; and it often happened that persons not properly bailable were let to bail, under pretence that the charge amounted only to suspicion. To remedy the former inconveniences, several provisions were made by stat. 1 and 2 Ph. and Ma. c. 13. First, as to the question of bail, who are and who are not intitled to that indulgence, it ordains, that stat. (b) Westm. 1. c. 15. shall in future be the law of bail and mainprize. Secondly, that what passes before the justices may be known and examinable afterwards, it directs, that when any one is brought before them on a charge of manslaughter or felony, or suspicion thereof, they shall take the information of those who make the charge against the party, in writing ; and shall also take the examination of the party accused ; which is the first authority given by our law to examine a man as to his own criminality ; it being generally held, that *nemo tenetur prodere seipsum*. These examinations are to be certified to the next gaol-delivery. The two justices are required to be present at this bailment, which is to be certified also to the gaol-delivery ;

(a) Vid. ant. 189.

(b) Vid. ant. vol. II. 181.

but one only may take the examination, and not till then can the accused be admitted to bail.

In like manner all coroners are directed to put into writing the material evidence given upon the inquest: and both they and justices of the peace are empowered to bind witnesses by recognizance to give evidence on the indictment; and such bonds and inquisitions are to be certified in like manner as the examination and bailment. In default of this, the coroners and justices are liable to be fined by the justices of gaol-delivery.

As these provisions concerning examinations were by the above statute ordained only in cases where the party was let to bail, it is enacted by stat. 2 and 3 Phil. and Mar. c. 10. that they shall be taken where the person accused is committed to custody. It is to be observed, that the county of Middlesex and city of London are not within stat. 1 and 2 Phil. and Mar. c. 18.

Of witnesses
in treason.

We shall now speak of the three statutes of Edward VI. and queen Mary, concerning witnesses in cases of treason; the fate of which statutes has been very singular; being disregarded while in force, and even supposed to be repealed; till having long lain dormant, they were, upon further consideration, held to be in force; again esteemed as repealed; and at length regularly observed, and looked upon as a part of our criminal law. During these reverses, they were considered in various lights, and underwent very different constructions. To understand, therefore, the operation these statutes have been held to have on one another, it will be necessary to look beyond the present reigns, to those times when this point was more fully debated.

It is the opinion of lord Coke, though perhaps not well-founded, that two witnesses were required on a trial of high treason at common-law. Whether this supposed rule had been violated in some recent instances, and a confirmation of it by parliament was thought expedient; or,

as others think, and history proves, one witness (or no witness^(a)) had been held sufficient to prove this, as it was to prove any other crime; whatever might be the occasion, it was ordained by stat. 1 Ed. VI. c. 12. and by stat. 5 and 6 Ed. VI. c. 11. that no person shall be indicted, arraigned; condemned, convicted, or attainted for any treason, petit-treason, or misprision of treason, unless he be thereof accused by two sufficient and lawful witnesses, as the first statute says, or two lawful accusers, as the latter expresses it: to which it is added by the latter statute, that they shall, upon the arraignment, if living, be brought in person before the accused, to avow and maintain what they have to say. After these two statutes, the stat. 1 and 2 Phil. and Mar. c. 10. enacts generally, that all *trials* for treason shall be had and used only according to the due order and course of the common-law of this realm, and not otherwise. The question which has arisen upon this statute is, what operation it has upon those two statutes of Edward VI. The opinions upon this question have been various at different times.

We find, very soon after the statute had been passed, namely, in^(b) 2 and 3 Phil. and Mar. and more solemnly in the fourth year, the judges came to a resolution, that the statute of Edward VI. was repealed by that of Philip and Mary. But they considered this repeal as partial, and founded a distinction upon the particular wording of the last act. The statutes of Edward VI. requiring two witnesses to indict, arraign, convict, and attain; the statute of Philip and Mary declaring, that all *trials* for treason shall be according to the due order and course of the common law; they inferred, that, at least upon the *trial*, there was no longer need of two witnesses. The practice of the courts seems so have been established in pursuance of this opinion

(a) Because a fact was tried by jurors, and not by witnesses. *Vid. ant.* vol. II, 268, 269. and *Plowd.* 13.

(b) *Dyer*, 122. 1000002

given by all the judges; for in all the state trials during the subsequent reigns, the statutes of Edward VI. are either forgotten; or, when any argument is attempted to be grounded on them, they are pronounced by the judges as repealed, and no longer in force.

In the reign of Charles I. we find that lord *Coke*, in a work published after his death (*a*), expresses himself of opinion that the statutes of Edward VI. are still in force. *Sir Matthew Hale* has given divers contradictory opinions upon this point. In his *Summary*, he is clear that two witnesses are necessary on the *trial*, notwithstanding the statute of Philip and Mary (*b*). In his *Pleas of the Crown* he positively says, that two witnesses are required upon the indictment only, and not upon the trial (*c*). In another place he reprobates the distinction between the indictment and trial, looking on the indictment as an inseparable incident to the trial, and in truth a part of it (*d*). However, in the same passage, he speaks very doubtfully as to the main question; though a little further on (*e*) he speaks of two witnesses being required by the statute to be examined face to face in cases of treason: which must be meant of stat. 5 and 6 Ed. VI. Thus did this great lawyer differ from himself upon this point.

We shall now consider the opinion of lord *Coke*; which, being more decisive than that of the former writer, and being that which has been adopted by *sir Michael Foster*, may be considered as closing this question. After discussing such points as had been made on these statutes by those who went before him, he proceeds to give what he calls his own opinion, upon due consideration of the matter (*f*). He thinks that the stat. 1 and 2 Phil. and Mar. does not repeal the stat. 1 Ed. VI. and stat. 5 and 6 Ed. VI. For that statute, says he, extends only to

(*a*) 3 Inst. 24, &c. (*b*) 262. (*c*) 9 H. P. C. 286. (*d*) 1 H. P. C. 298 to 300. (*e*) Ibid. 306. (*f*) 3 Inst. 26.

trials by verdict; whereas the indictment is no part of the trial, but an information or declaration for the king: *the evidence of witnesses to the jury is no part of the trial*; for by law, *the trial in that case is not by witnesses, but by the verdict of twelve men*; and so there is a manifest diversity between the *evidence to a jury*, and a *trial by jury*. When the statute speaks of *trials awarded*, that expression, he says, proves that it had in view the *venire facias* for trial; for neither the indictment nor the evidence can be said to be *awarded* (a). Thus far our author has explained himself upon this doubt, in a manner that may be thought extremely technical and refined; but he seems to lay some stress upon it, and to be perfectly satisfied that he is right.

Upon this idea our author goes on, and is of opinion that this statute of Philip and Mary had a very different object from that which had till then been generally supposed (b). He thinks it was intended to abrogate all acts of parliament prescribing a different method of trial from that according to the due order and course of the common law. Many provisions introducing new trials had been made in the reign of Henry VIII. and surely never was there a period in our law, when a reformation of this kind was more wanted; that the common law might, in this instance, be brought back to its first principles.

To give some instances of these innovations in the course of the common law; it had been ordained by stat. 23 Hen. VIII. c. 4. that treasons in Wales, and where the king's writ runneth not, should be tried by special commission in such shires as the king should appoint. By stat. 39 Hen. VIII. c. 20. persons confessing treason and afterwards becoming lunatic, might notwithstanding be proceeded against in their absence, and a verdict and judgment given,

(a) 3 Inst. 27.

(b) This construction of the statute was, however, glanced at by the court in 2 and 3 Phil. and Mar. where they held the statutes of Ed. VI. to be repealed. Dyer, 136.

on which execution might be ordered. By stat. 33 Hen. VIII. c. 23. persons charged with treason, or misprision thereof, being examined by three of the council, and vehemently suspected by them, might be tried by special commission in any county: by this act, too, the peremptory challenge of thirty-five, in cases of treason and misprision of treason, was taken away. By stat. 28 Ed. III. c. 13. a trial *de medietate* was allowed in treason.

All these acts (and there are several others) introduced a manner of trial derogatory to the due order and course of the common law; he therefore considers *them* as repealed by the stat. 1 and 2 Ph. and Mar. c. 10. and the regular and ancient order of proceeding restored (a).

As to the two statutes of Henry VIII. respecting treason out of the realm, and piracy, there is no particular observation made by our author in this place;—but in other parts of the same work, he speaks of them as still in force. Probably he thought, consistently with former judgments, that as these statutes extended the mode of trial according to the order and course of the common law, in the room of a proceeding by the civil law, it would have been inconsistent with the explanation above given, to have supposed these provisions repealed, which so far tended to effect the design ascribed to the statute of Philip and Mary. It was accordingly, in 2 and 3 Phil. and Mar. agreed that these statutes, for that reason, were not repealed by the act in question (b).

This opinion of lord Coke is adopted by sir Michael Foster, who has added his own thoughts upon the question. He thinks the legislature plainly indicated their opinion concerning the object of the stat. Ph. and Ma. when by another clause of it they enact, that in all cases of high-treason concerning coin current within the realm, or for

(a) 3 Inst. 26, 27.

(b) Dyer, 131, 75.

counterfeiting the king or queen's signet, privy seal, great seal, or sign manual, such manner of trial, and none other, shall be observed and kept, as heretofore hath been used by the common law of the realm, any law, statute, or other thing to the contrary notwithstanding: for, if the former clause had been intended by the legislature to take away the necessity of two witnesses in *all* treasons, why should they have added this to take it away in *some*? It would have been useless and nugatory; whereas it most certainly was meant to effectuate something which was not within the former part of the act. He thinks this is made very clear by the eleventh chapter of the same statute, which enacts, that in cases concerning the coin therein enumerated, offenders shall be indicted, tried, convicted, or attainted, by *such like evidence*, and in such manner and form as hath been used and accustomed within this realm, at any time *before the first year* of our late sovereign lord king Edward VI. by which clause the matter of evidence is extended as well to the trial as the indictment; and the time seems to be pointed out when two witnesses first became necessary (a).

Thus, though not by the common law, yet by stat. 1 Ed. VI. c. 12. two witnesses are required both on the indictment and trial for high-treason, petit-tréason, and misprision of treason; and by stat. 5 and 6 Ed. VI. c. 11. they are to be brought face to face with the prisoner.

In addition to what has been said respecting this famous statute 1 and 2 Phil. and Mar. c. 10. it should be remarked, that after the clause ordaining all trials to be had according to the common laws of the realm, there is another which provides for the trial of treasons *made by that act*, much in the manner and terms used by stat. 5 and 6 Ed. VI. c. 11.; for it ordains, that upon the arraignment for any treason mentioned in this act, all persons

(a) Fost. 239.

(or two of them at the least) who shall write, declare, confess, or depose any thing against the person arraigned, shall, if living and within the realm, be brought forth in person before the party arraigned, *if he require the same*, and object and say openly in his hearing what they can against him, concerning the treasons in the indictment.

In support of lord Coke's opinion, it may be remarked, that the very words of the statute of Philip and Mary upon which this question arose, are used in stat. 13 El. c. 1. in a manner which plainly demonstrates them to have been then understood as he suggests. That act speaks of persons attainted *according to the usual order and course of the common laws of this realm, OR according to the act made in 30 Hen. VIII. intitled, an act concerning the trial of treasons committed out of the king's dominions.* This seems like a clear parliamentary exposition of the words, and to be in itself conclusive, that they were intended to mark the common-law trial, in contradistinction to that and other new ones ordained in the time of Henry VIII.

Upon these statutes arises an observation, which none of the above writers have made, but which should be taken into consideration, in order to understand this point fully. In the preceding part of this History it has been remarked, that the office of the grand inquest was to present offenders on their own knowledge, and that it often happened for a person to be indicted without any one appearing as prosecutor, or accuser. When it afterwards became the custom to hear the informations of others, and upon this ground to find the indictment; it was a rule of evidence that the accuser, as he was called, who had preferred the charge to the grand inquest, should not be a witness to prove the fact in court; because (a) he might be supposed to be in the same mind he was in

(a) Vid. ant. vol. III. 136.

when he delivered his information; and instead of a confirmation and corroboration, as there ought to be, he could only give the jury a repetition of what he had before said.

A practice like this can only be explained by recurring to the original of the trial by petty-jury. We have seen that the petty-jury were originally brought as *witnesses*, to declare on their oath their opinion as to the guilt or innocence of the party charged by the indictment. It was therefore above all things expedient, that no person who either had been of the former jury, or had appeared before them as prosecutor of the indictment, should be allowed to join himself to those who were to try the propriety of *his* act. It was, accordingly, a rule established in the reign of Edward I. that no indictor should be on the petty-jury (a). In process of time, the petty-jury used to take occasionally other helps than their own knowledge: they used to read depositions of absent persons, and sometimes hear witnesses; but as these papers or persons were called in merely as assistants to them, and the trial was still considered as preserving the character of the old proceeding unaltered by this innovation, it was nothing more than reasonable that the ancient rule should be still adhered to: and that as those who had preferred the indictment could not be of the petty-jury; so now they should not, in the light of *witnesses*, assist in informing that jury.

This seems to have continued invariably the practice for many years. We have already seen that it was enacted by stat. 25 Ed. III. st. 5. c. 3. (b) that none of the indictors shall be put in the inquest upon the deliverance; which *indictors*, in the old writers, it should seem, meant as well the prosecutor as the grand inquest. There are many instances, in the subsequent period, of witnesses challenged because they were indictors (c). In the reign of Edward IV. the rule was recognised in cases

(a) Vid. ant. vol. II. 268.

(b) Vid. ant. vol. II. 459.

(c) Bro. Chal. 101. 142, 12 and 40 Ass.

of felony; though it was said not to hold in misdemeanors, contrary to the opinion in the time of Edward III. (a) It appears that this rule was still preserved at the time of the statute in question; for in the 4th and 5th of Phil. and Mar. it was agreed, amongst other things, by all the judges, that it was a good challenge to a witness to say, he was one of the accusers; that is, one of those who were witnesses on the indictment: for, says the book, accusers and witnesses so far differ, that the former offer themselves voluntarily, but the latter do not come till they are called; and therefore an accuser seems hardly unbiassed (b).

This being the prevailing opinion, it is beyond a doubt, that a new regulation respecting evidence was made by the statutes of Edward VI. independent of the number of witnesses. The very stile of stat. 5 and 6 Ed. VI. c. 11. seems to intimate, that the bringing before the court the accusers who had been examined before the grand jury, was something new. For it enacts, with some earnestness and precision, that "the said accusers
 " at the time of the arraignment of the party accused,
 " if they be then living, *shall be brought in person before*
 " *the party so accused, and swear and maintain* that they
 " have to say against the said party, to prove him guilty
 " of the treasons contained in the bill of indictment
 " laid against the party arraigned; unless the said party
 " arraigned shall willingly, without violence, confess the
 " same." If we can rely upon a cotemporary exposition of these statutes of Edward VI. and Philip and Mary, this was the opinion held by the learned of those days. For at a meeting of the judges, to which we have before alluded, in the fourth year of Philip and Mary, they came to the following resolutions amongst others: that as the repealing statute enacts all *trials* for treason to be ac-

(a) 7 Ed. IV. Bro. Chal. 166.

(b) Bro. Cor. 290.

according to the order of the common law, and not otherwise; and as a common-law trial is by a *jury and witnesses, and not by accusors*; therefore, upon *trial* of any treason under stat. 25 Ed. III. there needed *no accusors*; that is, the witnesses to the grand jury were not to be called on the trial, and brought face to face to the prisoner, according to stat. 5 and 6 Ed. VI. though accusors still expected to be at the finding of the indictment (a).

As to the number of witnesses, we find, that before the repealing statute, and while the statutes of Edward VI. were unquestionably in force, the effects of these provisions had been baffled by some singular explanations. It was resolved in the 1st of Mary, that if a person knew the fact of his own knowledge, and told it to another, that other person would make a good second witness, under the statute of Edward VI.; and in the like manner, he who heard it at second or third hand (b). When such strained interpretations were adopted to get rid of the check put on state-prosecutions, while those beneficial laws were in force, we cannot wonder that they so readily availed themselves of this statute of Philip and Mary, and pronounced it a repeal in that respect of the statutes of Edward VI.

When this point was so settled, and trials were conducted in pursuance of it, every thing fell back into its old state. These two statutes were the only provisions which had ever been made as to evidence, either defining the quality or number of persons whose testimony should be necessary to prove a fact; and when they were looked on as repealed, we need only turn back to former periods to judge what security was left for persons labouring under the weight of a prosecution for treason. Trials for treason at common law, notwithstanding the boasted security of juries, were a certain mode of destroying a man. Juries seem to have surrendered to the court their right of judging and deter-

(a) Bro. Cor. 220.

(b) Dyer, 99. b.

mining. They used to convict without a single witness, only upon depositions ; those sometimes not signed by the party making them, and the contents amounting to nothing but hearsay. They might by law, and they often did in fact, convict upon the arraignment, without any thing like proof. This was a serious matter in cases of treason, where passion, prejudice, and interest, carry men so far. The law was the same in all cases of trial by jury, in common felonies and misdemeanors ; but in these instances, it was not pregnant with such bad consequences as in the former ; there was not usually that heat in prosecuting ; and, in the latter, the judgment did not reach to life.

The statute of Edward VI. in enacting that the accusers should appear at the trial, legitimated a testimony to which before there lay a legal objection ; and this provision seemed to be equally expedient for the prosecutor and defendant. The prosecutor, on the credit of whose testimony the bill had been found, gained, by the statute, a right of *swearing and maintaining* what he, most likely, was alone, or best, able to testify. The prisoner, who was thus enabled to cross-examine the most formidable of the witnesses against him, being those on whose testimony the bill was found, so far obtained a great advantage.

However, though these benefits of the statute were thus for a time defeated, another provision respecting witnesses seems to have had some of those good effects on trials of felonies, which this statute was intended to produce in trials of treason. The stat. 1 and 2 Ph. and Ma. c. 13. directs justices of the peace to bind by recognisance all persons who declare any thing material respecting any felony, to appear at the next gaol-delivery, and to give evidence against the party so indicted, *at the time of his trial* ; and, as it is more fully expressed in stat. 2 and 3 Ph. and Ma. c. 10. *to give evidence against the party*. These statutes, by providing a compulsory method of obliging persons to give evidence against the party at the gaol-delivery, that is,

both on the indictment and on the trial, took away the challenge to accusers, and gave the prisoner that candid and open trial so much to be wished. If we may venture a conjecture, it is, most probably, from the time of these two statutes that we are to date the disuse of this challenge to an accuser. . . This challenge was supported upon the principle, that an accuser was a volunteer, and sort of party, and therefore not entitled to that credit which an indifferent witness enjoyed, who appeared and delivered his evidence under the compulsion of legal process. An accuser was now compelled to give evidence equally with a witness, and stood thereof in the same legal situation (*a*). When persons were bound in the same manner to give evidence in cases of treason, there was no reason why the like analogy should not operate with respect to them; and that the evidence of an accuser should in that case be in the like manner legal and valid. This probably soon became the law and practice; for in the time of queen Elizabeth, the distinction between an accuser and a witness seemed quite forgotten. A vestige however of this old law seems still to remain in the practice of indorsing on the indictment the names of witnesses examined before the grand jury: this, as has been before observed, might originally be intended to shew the court who were the *accusers*, and on that account were to be challenged, if attempted to be produced as *witnesses* (*b*).

After all, notwithstanding the repeal of the statutes of Edward VI. and the many instances which follow in

(*a*) In the ecclesiastical court, all voluntary preferers to the office were considered as parties. These stood precisely in the situation of persons giving information to a grand inquest, and it was from this idea of canonical jurisprudence that the challenge to accusers was adopted *. Some little confusion may arise from the term, because *accusation* is a mode of ecclesiastical prosecution contradistinguished from those by *inquisition* and *denunciation*, upon which two last the office always proceeded. Vid. ant. 36, &c.

(*b*) Vid. ant. vol. III. 136.

* An Apolog. for Eccles. Proc. part II. 88.

the subsequent reigns of partial and oppressive proceedings on trials, the reigns of Edward VI. and queen Mary constitute a period when a jury first began to be a fair and effective tribunal, assuming the right of judging for itself; and when persons whose fate was to be determined by their verdict, reposed a full confidence in their uprightness, independence, and integrity. There is an instance in the reign of Philip and Mary, where a jury persisted in acquitting a (a) state prisoner, against the direction of the court, and, it was well known, against the wishes of the sovereign. Whatever judges might pronounce respecting the existing law, it never went from the memory of prisoners, that a statute had once expressly declared, there should be two witnesses to prove a treason, and that they should be called face to face. As to trials of felony, it was an express recommendation of queen Mary, at the beginning of her reign, to her judges, that they should suffer prisoners to call witnesses for their defence.

The defence of prisoners in all criminal prosecutions seemed to depend on the like indulgence, and not upon any right to call witnesses; for in stat. 1 Ed. VI. c. 1. sect. 6. where a proceeding by indictment before justices of the peace in sessions is directed, it was thought necessary to ordain, that the party arraigned *shall be admitted* to purge or try his innocence by as many, or more, witnesses, and of as good honesty and credence, as the witnesses which deposed against him.

Thus many circumstances contributed actually to render this mode of trial a more deliberate and complete examination of a matter of criminality than it had ever been before. While enlarged notions respecting the power and importance of this institution began to prevail, it was more and more considered as independent in some degree of the court, and as having an authority and judicature of its own; the progress of which opinions will be seen in the sequel.

(a) Sir Nicholas Throckmorton.

CHAP. XXXII.

EDWARD VI. PHILIP AND MARY.

Assignees of Reversions—Conditions and Limitations—Of Feoffees to an Use—Covenants to raise Uses—Origin of Trusts—Whether Remitter by an Use—What Jointures will bar Dower—Assumpsit against Executors—Witnesses in Treason—Distinction between Murder and Manslaughter—Burglary to be by Night—Trial of Principal and Accessary—Reformation of the Ecclesiastical Law—Of Marriage—Of Wills—King and Government—New Commissions—Trial of the Duke of Somerset—Of Sir Nicholas Throckmorton—Bills of Attainder—Judicial Proceedings on Account of Religion—Staunforde—Printing of Law Books—Miscellaneous Facts.

THE new points of learning that had lately engaged the attention of the courts received an accession from the statutes of the last reign. These, whether they related to property or to crimes, furnished fresh objects of litigation, and new topics of argument, and drew from the judges several decisions of importance during these two short reigns.

Many questions arose upon leases granted by religious corporations. These bodies, having seen the destruction of some of their brother societies, were resolved to make the most of their property while they had it; and therefore granted long leases to their friends, and their former lessees. The stat. 31 Hen. VIII. c. 13. for the dissolution

of monasteries, amongst other regulations on this head, had declared all leases void, if made within a year before the beginning of that parliament; with a proviso, that where the lessee was at the time in possession under a former lease for years, there the second, if made for that time, or more, should be good for twenty-one years. The case of *Fulmerstone* versus *Steward* arose upon this proviso (a), and many others of the same kind were agitated in these two reigns; but as the subject of them was temporary, they furnish no inquiry that can engage the curiosity of the modern lawyer.

Another provision, occasioned by the dissolution of monasteries, had a greater and more lasting influence. The stat. 31 Hen. VIII. c. 19. abovementioned, had permitted the king to take advantage of all covenants and conditions to which the religious societies had been parties; and which it was convenient should go to the crown along with the reversions which were given to it by parliament. But this benefit not extending to the king's patentees and grantees, the parliament took it into consideration, and by stat. 32 Hen. VIII. c. 34. gave the same power to them: this was thought a good opportunity to correct an old defect in the law, and to include also common persons as well as the king's grantees. It was accordingly permitted to all reversions. grantees of reversions to avail themselves of covenants made to their grantors; and lessees in the same manner were meant to have a reciprocal claim upon such grantees, as they before had on their lessor. But this was done in such an obscure way, that it was difficult to say, whether the whole benefit of the act was not confined to grantees of the king, and of abbey-lands. This doubtful wording of the act gave occasion to the case of *Hill* versus *Grange*, where this matter was fully canvassed,

(a) 1 and 2 Ph. and Ma. Flowd. 102.

and it was resolved by all the judges of the common-pleas, that the act extended to all grantees of reversions; a construction which it has borne ever since.

The rules that had been long laid down, and adhered to for the government of limitations in remainder, had not so precisely defined the boundaries of these estates, but that on some occasions arguments were found to dispute their authority, or at least to weaken their operation by endless distinctions. This may be seen by the discussion which was raised in *Colthirst versus Befushin*, where a limitation that seemed to be well supported by the example of former times, was contested with some shew of reason and law. It was a lease from a religious house to a man and his wife for their lives, remainder to *A.* their son for his life; and if he died during the life of the husband and wife, then remainder to *B.* another of the sons for life, *si ipse vellet inhabitare, &c.* which was a common condition in the leases of ecclesiastical persons, who in this manner provided not only for keeping their possessions in tenantable order, but likewise bound their tenants to perform a duty which was incumbent upon churchmen in all instances, namely, to preserve some appearance of that hospitality which was one principal consideration of gifts in mortmain.

The objections raised to this remainder to *B.* were these. It was said, that a remainder could not commence on condition; because if so, it would not pass at the first livery, which was required in every remainder. Again, it was incompatible with the preceding estate; for if it was to commence *then*, namely, when the eldest son died before the husband and wife, it must, in taking effect itself, destroy the particular estate; which was a repugnancy and contrariety that the law would not suffer. These seem to be the chief points relied on, and these were supposed to be sanctioned by the authority of adjudged cases. But all the

judges of the common-pleas were clear that this was a good remainder.

They said, this remainder was perfectly agreeable with the principles of law already established : they denied, first, that a remainder ought to pass out of the lessor presently ; for if I make a lease for years remainder for life, upon condition that if he in remainder do not such an act, the remainder shall be void ; here before the condition broken, the remainder is good ; but when the condition is broken, the remainder is out of him, and passes again to the lessor ; which proves that a freehold may, by agreement at the time of the livery, pass from one to another by matter *ex post facto*. Thus, if a lease for life is granted, with remainder to the king, and livery of seisin is made, the remainder does not pass till the deed is inrolled. In *Plessington's case*, in the time of Richard II. (a), where one condition was, that if the lessor died within the term, the lessee for years should have the land for life, the condition was held good. So in the present case, the remainder to *B.* did not pass out of the lessor till *A.* was dead, and then it passed by virtue of the original words annexed to the livery. But it was not to take effect till after the death of the husband and wife, for that is the plain and obvious sense of “ then ;” and they agreed, that if it was to be construed in the sense given by the counsel, the remainder should be void.

Conditions and limitations. It was said by *Hinde*, justice, that this remainder did not depend upon a *condition*, as had been argued, but on a *limitation* ; for the words to make a condition are such as restrain the thing given ; as upon condition that he shall not do such an act : but here the words only *limit* the time when the remainder shall commence, and no ways restrain the thing. The common case of an estate tail is, that if the donee die without issue, it shall remain to a stranger ; which is not a condition, but a limitation. *The*

(a) 6 Rich. II. Fitz. Quid juris 80.

chief-justice Montague agreed with him entirely in this idea ; and added, that whether it was called a *condition* or *limitation*, yet he thought the remainder good ; for the lawful owner of land, he contended, might give it to what person, at what time, and in what manner he pleased, so as it was not repugnant to law ; and this in question he thought perfectly agreeable to ancient and modern precedents. Of the former kind, he quoted one of those common cases in the reign of Edward III. where, for the assurance of a lessee for years, it was usual to make a charter of feoffment on condition that if the lessee was disturbed in his term, he should have the fee. And he called to their mind a case which was mentioned in the reign of Henry VIII. of a fine to pass lands in tail, with condition to bear the consor's standard ; and on failure, that the land should remain to a stranger (*a*). He said, he was counsel in that case ; and though *Fitzherbert* expressed surprise at a fine being levied on condition, yet the remainder was not considered as any thing remarkable. He was of opinion, that the remainder in the present case did pass out of the lessor at the time of the livery, although it did not vest in *B.* till the death of *A.* ; and he held it in abeyance until the performance of the condition, upon the possibility that it might be performed. Thus if land was given to a married man and to a married woman, and the heirs of their two bodies, the fee tail passed out of the donor immediately by reason of the possibility that they might marry ; and in the mean time the inheritance was in abeyance. In the same manner, he said, the remainder here was in abeyance, till the event on which it was limited had happened.

Upon such reasons, the judges agreed in holding this to be a good remainder (*b*). The arguments and adjudication on this occasion tended to set in a better light the learning of remainders depending on a contingency ; and the dis-

(a) Vid. ant. 336.

(b) 4 Ed. VI. Plowd. 32.

inction between a condition and a limitation afforded a new idea, which was afterwards made great use of, in the construction of restrictive clauses in deeds and devises of land.

Whatever doubts might be entertained on conditions that were designed by the parties to operate in destruction of estates, there was one condition created by the legislature, which infallibly annihilated an estate, whether for life or entail, and gave a right of entry to the person next intitled in remainder or reversion. This was the alienation of a woman who had an estate from her husband, which by stat. 11 Hen. VII. induced a forfeiture. A case came before the court of common-pleas in 4 Ed. VI. which gave occasion to this statute being fully examined and explained; and as it contains some argument upon the new learning of uses, it is on that account deserving of notice. This was *Wimbish versus Talbois*, where a feoffment had been made by sir George Talbois to the use of himself and wife in special tail; after which came stat. 27 Hen. VIII. They had issue Thomas and William; and then sir George died. Thomas died, leaving issue Elizabeth, who married to Wimbish. Afterwards William by covin with his mother lady Talbois, brought a formedon *in descendre* against her; she appeared at the first day, and William recovered by *nient dedire*: upon this Wimbish and his wife Elizabeth, as heir to sir George, entered by virtue of the stat. 11 Hen. VII. c. 20.

It was contended that this entry was not lawful, for several reasons. They said, that lady Talbois did not hold such an estate as was described by the act; for, by the first branch of the act, she should have an estate in dower for life, or in tail jointly with her husband, or solely to herself, or to her own use in any lands, tenements, or other hereditaments, of the inheritance or purchase of her husband. Now, admitting her to have an estate tail jointly with her husband, they said it was not *in lands*, but only *in use*: and

those were two different things. Again, it was not of the inheritance or purchase of the husband; for the *use* was neither, being a new thing, not in being before, and so never in the husband; so that she was not within the first branch. The second branch speaks of the like estates when they came from any ancestor of the husband, which was not pretended to be the case here. And the third branch is, where the estate comes by any person seised to the use of the husband or his ancestors; and they said, she was not within this branch, for the use was appointed by the husband at the time of the estate of the feoffees, therefore she could not claim from them. It was concluded, therefore, that lady Talbois not being within the terms of the act, no forfeiture could ensue. Further, they contended, that admitting she was, yet the heir in her life-time could have no right to enter; for the construction of the two clauses relating to the forfeiture was, that the recovery in case of tenant in tail was merely void, and that the issue should enter as if no recovery had been suffered, after the death of the tenant, for then, and not till then, had an heir any right or title; and it was only where the woman was tenant in dower, or for life, that the reversioner, or he in remainder, might enter immediately.

These were the points upon which it was endeavoured, ingeniously enough, to take this case out of the statute; but it was held by the whole court of common-pleas, that this case was within the words of the act; and if not, that it was at least within the equity of it, and that the entry was lawful immediately, in the life of the tenant in tail.

As to the first point, whether *cestui que use* was within the act; it was admitted by *Hales*, justice, that an estate in use is mentioned but once in the premises of the statute, *solely to herself or to her own use*; but if that clause speaks only of *cestui que use*, and what follows relative to recoveries had against women, or any seised to their use, is only

to be referred to that, it could not be denied but the present case was clearly within the words of the statute. It is to be observed, says he, that this act was made within fifteen years after stat. 1 Rich. III. which makes the acts of *cestui que use* binding on his feoffees; and perhaps some of the makers of that statute were also at the making of stat. 11 Hen. VII. and must have considered the effect of the first statute, by which, a recovery was good only during the life of tenant in tail: and so, if stat. 11 Hen. VII. did no more than make the recovery void against the issue, it would provide only for that which needed no provision. The statute must be designed to make that unlawful which was lawful before; and as it was meant to have this effect with regard to a tenant in tail in possession, it was equally reasonable, because it was in equal mischief, that it should be construed to have the same effect against *cestui que use* in tail. This latter consideration had always been a reason in our law for extending a statute by equity to such cases as were not within the letter of it. Of this there were many examples. Thus, the stat. Marl. c. 6. though it speaks only of estates for years and feoffments, yet is construed to include a gift for life, or in tail to the issue, for the purpose of defrauding the lord of his ward. The stat. *de donis* speaks only of three estates' tail, but has been extended to many others. Stat. Westm. 2. c. 3. which directs him in reversion to be received to defend a suit, has been construed to include those in remainder. An action of account given by statute to executors has been extended to administrators (a); and many other instances were given of statutes construed by equity. From all this it appeared, that a like grievance should by equity be taken to be within the purview of the act.

In all this the *chief-justice Montague* concurred; and with regard to the words of the act, which required it to be

(a) Plowd. 53.

of the inheritance or purchase of the husband, he said, that being such as the heir might inherit, was the true legal idea of an inheritance: and he treated with contempt the distinction made between an inheritance and purchase, which had been quoted from *Britton*, whose book he said contained many errors. For himself, he professed to follow Littleton, which he called the truest and surest register of the grounds and principles of our law; and Littleton says, that not only what a man has by descent, but also what he has by purchase, is an inheritance. Thus, he concludes, the words of the statute are satisfied; for she has an estate in an hereditament (namely, in a use) jointly with her husband, to her own use, of the inheritance of the husband, which is all required by the first disjunctive sentence of the statute.

But if she was not within that, she was within the second disjunctive sentence, *or given to the husband and wife in tail by any person seised to the use of the husband*: for the feoffees being seised to the use of the husband and wife, were seised to the use of the husband (the husband and wife each having the entire use, for there are no moieties between them), and the feoffees were the donors of the estate, after the execution of the possession to the use by stat. 27 Hen. VIII. for the parliament could not be said to be the donors, the act being only the conveyance of the land from one to another. He said, it had been long since held, where *cestui que use* and his feoffees joined in a feoffment, that it should be construed to be the feoffment of the feoffees; for they had the greatest authority to give it, even after the stat. Rich. III. (a). So if one who was seised in fee, and one who had nothing in the land, joined in a feoffment, it shall be said to be the feoffment of him who has right, and the confirmation of the other. Thus, he concluded, it should here be said to be the feoffment of the

(a) M. 21 Hen. VII. 32. pl.

feoffees by parliament, and the assent and confirmation of all others; and if it was construed otherwise, it would be attributing to the statute the power of doing wrong to the feoffees, by taking a thing from them and making another the donor of it. Thus, the feoffees were the donors; but if they were not, yet sir George was, unless it should be thought a repugnancy to say he was a donor to himself; and therefore the feoffees more properly were the donors, and then the whole of the statute was satisfied. However, if this case was not within the words, he agreed with the other judges in thinking it within the equity of the statute; and to obviate the objection, that the provision being in restraint of the tenant in tail should be construed strictly, he said it was for the benefit of the common-weal, and in advancement of justice; and every statute which is construed by equity, restrains, and is penal to somebody; and he seemed to think the rule of construction was to turn on the statute being beneficial to the greater number (a).

Though no judgment was here given, it was of great importance that the judges concurred unanimously in so solemn opinion to bring this case within the terms of the act; for, since most estates in the kingdom were conveyed to a use, this provision would otherwise have become almost wholly abortive. The anxiety they felt to compass this by a literal construction, led them into some subtlety and refinement; and though there can be very little doubt what the makers of the act intended, yet the wording of it being liable to some cavil, it seemed a safe and sensible resolution to supply the defects of it by equity.

Of feoffees to a use. In these two reigns some decisions were made on uses, which tended to shew the effect the late statute had upon them. It seemed a doubt, when that statute had ordained that *cestui que use* should thenceforward be seised of the land and freehold, as he before was

(a) Plowd. 42.

of the use, whether any seisin of the freehold remained in the feoffees. The courts seemed inclined to think the feoffees still possessed of the same estate and power they had before the act; so that both the *cestui que use* and the feoffee having a freehold, and both having an equal power over the same freehold, the difficulties of that sort, which were experienced after the stat. 1 Rich. III. were felt after the stat. 27 Hen. VIII.

The following are some instances where this point was debated. A man made a feoffment in fee to the use of *W.* and his heirs, till *A.* paid 40*l.* to *W.* and then to the use of *A.* and his heirs. *A.* paid to *W.* the 40*l.* There was a difference of opinion as to the conclusion to be founded on these facts. Some said, that if *A.* entered, he would become *ipso facto* seised in fee; for *W.* being seised in fee by the statute of uses, *A.* would be able to divest that fee, and transfer it to himself under the condition of the deed. Others, on the contrary, were of opinion, that the payment and entry of *A.* had no effect without an entry by the feoffees. Between these two opinions *Brooke* has struck out a middle course, as an expedient to salve difficulties: he thought that it would be best for *A.* to enter in the name of the feoffees, and then, *quodcumque vult dabit*, the entry must be good, and he would become seised according to the terms of the deed. To this he added, that a use might change from one to another by some act or circumstance, *ex post facto*, as well since as before the statute (*a*).

Another question arose respecting the interest of feoffees, in the case of *Stephen Davis*. A tenant for life, and the tenant in tail next in remainder in use, had levied a fine of the land, which had afterwards been conveyed to the king; the feoffees to the use presented a petition of right: and here two points were made in arrest of judgment on the petition. First, that the fee simple of the use was legally conveyed by the fine, and was now in the king; and

(a) 6 Ed. VI. New Cases, 136.

if it was the base of a common person, he could not enter; because not being seised of a fee simple, as he was before the alienation, of what estate could he be in? Secondly, they said that all interest and right of the feoffees, which was not to their own use, was taken away by the statute. There does not appear to be any decision of these points at this time (a); and it will afterwards be seen, that all these positions received some qualification.

Covenants to raise uses. The rigid opinions maintained in the last reign against *covenants to convey uses*, were beginning to be somewhat tempered. A question arose upon a covenant of this sort in the reign of Philip and Mary. Sir Thomas Seymour, the lord-admiral, who was attainted in the last reign, had covenanted and granted to one Andrew, in consideration that the said Andrew had conveyed, after his death, divers lands in fee simple to the said sir Thomas, that he would levy a fine to certain persons of lands whereof the said admiral was then seised, to himself for life, remainder to the said Andrew in tail. No such fine was levied; and it now became a question, whether the covenant of itself had changed the use. It was debated at Serjeant's-Inn; and it there appeared to *Bromley the chief-justice, Portman, Brown, Sanders, Brooke chief-baron, Whiddon, and Griffin the attorney, and sir James Dyer*, that no use could be presently altered by this covenant; for it was future, and the covenant could not now by any possibility be performed. But they, in a manner, agreed that if I covenant in consideration of marriage, or for a sum of money paid to me, that I should have certain lands, this would change the use presently, because there the estate was not to be made afterwards, as in the case before the judges. It was also agreed, that if *cestui que use* willed that his feoffees should make an estate to J. S. in tail or in fee, and then died, yet the use would be completely changed before the estate was actually executed by the feoffees (b).

(a) 7 Ed. VI. Dyer 96. 409. (b) 1 Mar. Dyer 96. 41.

These concessions were a sufficient foundation for the superstructure that was afterwards raised upon them. Two years after the following case happened: A covenant was made that the son of *A.* should marry the daughter of *B.* for which *B.* should give to *A.* an hundred pounds; and *A.* covenanted with *B.* that if the marriage did not take place, then *A.* and his heirs should be seised of certain lands to the use of *B.* and his heirs *quousque*. *A.* and his heirs or executors repaid the hundred pounds: after this *B.* died, and something happened to prevent the marriage taking effect; so that it became a question, whether the use was changed by the above covenant. And it was held, that the use was executed by the statute in the heir of *B.* notwithstanding *B.* was dead before the refusal of the marriage; for the covenant bound the land with the use in the life of *B.* (a).

A covenant was made upon consideration of love, favour, and other good considerations, to suffer a recovery to sir Anthony Wingfield, to the uses mentioned in a deed; which uses were contained in a clause, wherein the said sir Anthony covenanted and granted for himself and his heirs, that within eight months after the assurance so made, he would make, or cause to be made, an estate to his own mother for life, remainder to himself and his wife in special tail, remainder to his wife in fee. A recovery was suffered, but no estate made by sir Anthony; and it became a doubt, whether the use was changed by the deed, and the operation of the statute upon it. And it seemed to the two chief-justices, justice *Stamford* and sir *James Dyer*, that no use was changed by the indenture and recovery only, without an estate being properly executed; for if so, a construction of law would be allowed which might make it impossible for the covenantor to perform his covenant: they not only held no use to be changed under the statute and the deed, but they also added, that no *subpœna* would lie to compel

(a) 3 Mar. New Cases, 137.

air Anthony to carry it into execution, *because* there was a remedy at common law by action of covenant (*a*).

It was not only in the instance of these covenants that the courts of common law entertained scruples of allowing a use to be conveyed, where a plain and obvious intention of the parties to raise a use was discoverable from the transaction and terms of the deed; but we have seen in the former reign, where it was directed that the feoffees should take the profits and pay them over to another, that the judges held this not to be a use executed by the statute in the person to whom the profits were to be paid (*b*). The judges did not then go so far as they did on the present occasion, and declare that no *subpœna* would lie. It must be confessed, that the present is not so strong a case as the former; this being an *executory* covenant, and, as such, plainly within the rule which had been laid down upon that head, in the repeated decisions of this and the former reigns.

Origin of
trusts.

However, it will be seen, notwithstanding the court of chancery might at this time join with the courts of law, and deny relief in these executory covenants, that in after-times persons were enabled most completely to substantiate these claims in equity as *trusts*, which ought in conscience to be fulfilled.

The like observation may be made on a decision in the latter end of Philip and Mary. It was resolved by the whole court of common-pleas, in the case of *Jane Tyrrell*, that a use could not be limited on a use. *Jane Tyrrell* bargained and sold land for a sum of money, *habendum* to the bargainee and his heirs for ever, to the use of the bargainor *Jane Tyrrell*, for life, and after her decease to the bargainee in tail, remainder to the use of the heirs of the bargainor in fee. It was objected, that the uses beyond the *habendum* were all void and impertinent; for a use could not be reserved, or raised out of a use; and by the nature

(*a*) 4 and 5 Phil. and Mar. Dyer, 162, 49.

(*b*) Vid. ant. 351.

of this conveyance, by bargain and sale, a use was first transferred to the bargainee, before any Freehold or inheritance was vested in him by the enrollment. The court had before conceived some doubt, whether all the uses beyond the first were not mere nullities; and now it was so adjudged by *Sanders*, chief-justice, and the rest of the court (a). Here was another occasion for the aid of a court of equity to temper the construction of the courts of common law. In this manner, after the making of the statutes of uses, did the strictness of the judges, in construing those conveyances, drive uses back into the courts of equity. The chancery once more, as in the reign of Henry VI. took up uses where the common law rejected them; and all such uses, with most or all of their consequences, became peculiar objects of that court's jurisdiction, under the idea and consideration of *trusts*; which ought, in conscience, to be established and fulfilled, though they were not wholly consonant to the rules and course of the common law.

It seemed to be in consequence of the statute of uses, that the judges agreed to consider a recovery where a *cestui que use* in tail was vouchee, to be a sufficient bar of the issue (b). As the statute had put the *cestui que use* in complete seisin of the freehold, he was in the condition of other tenants in tail, and entitled to every advantage which a recovery could furnish for disposing of his estate.

Notwithstanding the determination in the reign of Henry VIII. that no remitter was worked by the execution of the possession to the use (c), this point was brought forward again, and argued in the court of wards, in 1 and 2 Phil. and Mar. in *Townsend's case*. There *sir Roger Townsend* being seised in tail in right of his wife, made a feoffment to the use of himself and his wife for life. Upon the occasion of one of *Roger's* descendants leaving at

(a) 4 and 5 P. and M. Dyer, 153, 20. (b) Ed. VI. New Cases, 127.

(c) Vid. ant. 359, 360.

The counsel in the present case seemed to be aware of this; and, not venturing now, as in the reign of Henry VIII. to argue the contrary, they were content to admit such adjudication to be right: but they contended further, that if the statute did not give, it ought not to hinder a remitter. The above reasoning, however, of those who were against the remitter, went the length of saying, that no remitter could be worked in such case where the entry was taken away. Yet the decree went no further than to say, generally, that the wife was not remitted by force of the use, and the execution of the possession by the statute (a).

The clause in the statute of uses relating to jointures was another new subject of judicial discussion. The statute is particular in describing what estate shall be allowed a sufficient bar of dower. But we shall see the courts went further, and admitted many others, as within the equity of the act. No decision upon this part of the statute in the reign of Henry VIII. has come down to us, unless that may be called one, which is reported on the will of *Whorewood*, the attorney-general. *Whorewood* left estates of the

What jointures will bar dower.

value of 360l.; of which, to the amount of 60l. his wife was joint-purchaser with him: by his will he declared that his wife should have, during her life, a third part of all his lands and tenements, together with those she had in jointure, to be assigned by his executors, *if it was not contrary to law*. The widow refused her jointure of 60l. and demanded 120l. as the third part of the whole, in light of a legacy by the will; and also 80l. as a third of the residue for her dower. All this appeared in the court of wards; but no regular decision seems to have been made upon the point of law; for we are told it was by *agreement* decreed and ordered, that she should have the legacy of 120l. and 40l. of the residue in lieu of her dower (b): so that this case proves nothing. But it is said, that in a si-

(a) 1 and 2 Ph. and Ma. Plowd. 111. (b) 38 Hen. VIII. Dyer, 61. 31.

thilar case in 5 Ed. VI. where a manor was devised to enlarge the wife's jointure, and she relinquished her jointure, it was determined she should not have the manor; because, as it was given for *enlargement* of her jointure, the intention of the testator could not be fulfilled (a).

Respecting the nature of the estate given in jointure, we find it laid down positively *per justitarios* in 6 Ed. VI. that wherever a man makes his wife joint-purchasor with him, after the coverture, of an estate of freehold (except it is in fee-simple) it shall bar the dower, if she agrees to it after his death. A fee-simple would not answer, because it was not named in the act; and further, they held a devise of land to the wife was no bar of dower; for that was a benevolence, and not a jointure (b). It was agreed, that any joint-estate of freehold was sufficient, though not named in the act; and in conformity with this opinion, it was decided in the case of the duchess of Somerset, in the beginning of the next reign, that an estate to a man and his wife, and the heirs male of their bodies, was a good jointure: and yet that is not one of the five estates mentioned in the act; and the duchess had there brought a writ of dower, under the idea that such an estate was no bar (c).

The remainder of what we have to add of the decisions of courts during these reigns, will relate to the nature and conduct of certain actions, and the alterations that took place in criminal proceedings. Hitherto we have considered actions upon the case as supplying the place of several ancient writs. In the last reign, there is an intimation of one being used instead of the action of debt, in matters of simple contract: this was called an *assumpsit*, from the suggestion of an *assumption* or *promise* made by the defendant, for the breach of which the action was

(a) Dyer, 61. 31. in the notes.
96, 42, and 97, 48.

(b) B. N. C. 95.

(c) 1 Mar. Dyer,

brought. We shall now see this liberal action applied to another object with the same success. It was as desirable to devise some action in the room of *detinue*, as it had been to substitute one in the place of that of debt, the wager of law being a legal method of defence in both. We intimated in the last reign, that a new writ to this effect had been made (a). We have now authority to speak more particularly of its nature. A writ upon the case had been framed, which surmised, that the plaintiff being possessed of the thing in question, lost it; and that the defendant *found it*, and *converted it* to his own use, upon which the action accrued. This, from the suggestion which gave the cue to the demand, was called an action *sur trover et conversion*, or an *action of trover*; that is, grounded upon a supposed *trover* by the defendant of the thing demanded, and *converting* it to his own use.

The first action in this precise form, to be found in our books, is in the fourth year of Edward VI (b). Again, in 2 and 3 Ph. and Ma. (c) there is an action of trover; and from the kind of exceptions taken to the declaration, it should seem that the action was considered as a novelty, and as if it had not been long, or not generally, in use: though it must be allowed, that (beside the case in Edward VI.) the actions upon the case above alluded to, in the reign of Henry VIII. are very similar to it. However, it was not till this period that this action was substituted in the place of that of *detinue*; which, from thenceforward, became gradually less frequent.

The manner of pleading to this new action of trover, was framed like that used in the infancy of other actions upon the case. The plea was drawn specially, pointing at some material allegation, as it was then conceived, in the declaration; and so concluded either to the court, or the

(a) Vid. ant. 385.

(b) Bro. act. sur le case, 113. Vide ibid. 10).

(c) Dyer, 121. 14. 16.

country. The declaration in the case just beforementioned was this: that the plaintiff was in possession of a chain of gold; which he lost; and that it came *by finding* to the defendant's hands, who sold it, and *converted it* to his own use. To this the defendant pleaded, by traversing the selling *modo et formâ*, as supposed in the declaration; and then concluded with an averment, and judgment of the action. To this the plaintiff demurred; and it was held by the court, that the plea was good (a); though it was said, that it would have been better to have pleaded *non culpabilis*; which would have answered, said the court, all the misfeasance alleged in the declaration. In like manner, in the action in 20 Hen. VII. which was against an executor for goods bailed to his testator, the conversion was traversed.

The reason upon which this kind of pleading was founded, we have before shewn, is to be looked for in the old action of detinue. In an action of detinue, in 27 Hen. VIII. (b) it was held, that if a person came to the possession of goods by bailment, he was answerable upon the bailment merely; but if by *finding*, he was chargeable no longer than while he was actually in possession of them; therefore, in an action of detinue, where a bailment was suggested, the bailment was traversable: and it was the opinion of *Shelley*, that, by the same rule, the trover (and the conversion was the same) was traversable. As the action of trover was grounded upon that of detinue, it was natural that some of its peculiarities in pleading should be copied from the same original.

The debated question (c), whether *assumpsit* would lie against executors, was again brought forward in 4 and 5 Ph. and Ma. It then received a final determination in the affirmative; and that judgment has governed the courts ever since. This was in the case of *Norwood versus Read*.

(a) *Dyer*, 121, 122.

(b) 27 Hen. VIII. 13.

(c) *Vid. ant.* 380.

Assumpsit
against exe-
cutors.

The plaintiff there declared, that the testator, in consideration of so much money to him paid by the plaintiff, promised and assumed to deliver to the plaintiff, certain quantities of wheat at different days; that the testator outlived the last day; and although the plaintiff was ready at the time and place agreed to receive the wheat and to pay for it, the testator did not deliver it according to his assumption; nor did the defendants (to whose hands sufficient of the testator's goods came to satisfy this and all other demands) since his death, deliver it, but wholly refused. This was the declaration; and to this the defendant's counsel, relying on the last determination, demurred in law.

In support of this demurrer, it was argued, that the assumption of the testator was no other than a *simple contract*; and if the executors should be charged with it, on the same reason should they be charged by every contract executory, as well for debt as for other things; for every contract executory is an *assumpsit* in itself. They said, it would be inconvenient to charge them as well by contracts *in pais*, as by specialties; for of the former they could have no knowledge. The court had directed that precedents might be looked for; many were found, and shewn to the court: but the counsel for the defendants said, that in all these the executors had pleaded in bar, and upon the pleas being tried for the plaintiffs, they had recovered; so they contended this proved nothing against *them*, for they had demurred, and so brought the point directly in issue. They said, it was adjudged in 13 Hen. VI. that if the executor pleaded in bar, where he might have waged his law, he should not have advantage of it in arrest of judgment, or in error; the presumption of the law being, that the executor is ignorant of the debt; but when he takes upon him the knowledge of it, by pleading in discharge thereof, it is reasonable he should lose the favor the law intended him: whereas by this demurrer, they said, they took upon

themselves no knowledge of the contract, but prayed the benefit the law gave them on account of their presumed ignorance. Thus, not being within any of the precedents, there was but one case against them, and that was in 12 Hen. VIII. (a); and there it does not appear whether the executors demurred, or not; and if they pleaded in bar, it was no more against the present case, than the precedents beforementioned. But admitting judgment to have been given on demurrer, they then alleged the opinion of *Fitzherbert*, in 27 Hen. VIII. who, as we have before seen, pronounced it not to be law (b).

To this it was answered, that in this action of trespass upon the case, the testator could not have waged his law; and they contended it to be a rule of law, that where the testator would not be allowed this privilege, the action would lie against the executors. They said it was not reasonable, if they had assets to pay debts and legacies, and also to pay the plaintiff, that they should retain the rest of the goods to their own use, being only put in trust for the benefit of the testator's estate: that the judgment in 12 Hen. VIII. being given by the court, was not so easily to be rejected on the mere *dictum* of *Fitzherbert*. They admitted there might be some weight in the objection to the declaration not averring that there were assets after paying the legacies; and they thought the justices had better give judgment upon this, than on the principal matter. Upon searching the record of the case in 12 Hen. VIII. it appeared, that the averment of assets did not extend to legacies, as the report says, but only to debts, and to satisfy the plaintiff also; which exactly corresponded with the present declaration.

These were the arguments on both sides; and the justices were so easily satisfied on the subject, that they gave judgment for the plaintiff, as *Plowden* says, without any

(a) Vid. ant. 381.

(b) Vid. ant. 381.

solemn argument. We are informed from the same authority, that many learned persons had entertained doubts upon the decision in 12 Hen. VIII. not thinking that case to be well adjudged; and that such action was not maintainable by the ancient law, but *that conscience had encroached the case upon the common law.* He himself, however, was of another opinion; and he even judged the action to be good, without surmising that the executors had assets to pay debts, and satisfy the plaintiffs also (a): so far was he from agreeing with those who would have had the averment to include *legacies.*

Witnesses in treason. We shall now consider what was done by our courts in addition to the many alterations that had been made by the legislature in our criminal law. The statutes relating to witnesses in treason are the most striking part of the penal laws in this period; and very few years elapsed before the judges were called upon to come to some resolutions on the construction of them, as has already been hinted when we spoke of those statutes. At Serjeant's-Inn, in the fourth year of Philip and Mary, the judges came to the following resolution on the statutes concerning witnesses: That on the trial of treason and misprision of treason, there were required by the statutes two accusers or witnesses to the indictment, or sayings and accusations in writing under their hands, or the testimony of others to such accusation, which should be read to the jury on the indictment. Should the accusers happen to be dead at the time of the indictment, they held it sufficient if the accusation was there testifying the fact, for then there were two accusers. They held likewise, that for any treason under stat. 25 Ed. III. there needed no accusers at the trial, because it was enacted by stat. 1 and 2 Ph. and Ma. c. 10. that all trials of treason should be by the order of the common law, and not otherwise; and the trial by common law was

(a) Plowd. 180.

by jury and witnesses, and not by accusers. The same of treason in coining, there needed no accusers at the arraignment, but only at the indictment. But they held, that in all treasons under stat. 1 and 2 Ph. and Ma. c. 10. there ought to be witnesses or accusers, as well at the indictment as at the arraignment, pursuant to a clause at the end of that act. Again, in misprision of treason, there ought to be witnesses or accusers, as well upon the indictment as the arraignment, by stat. 1 Ed. VI. c. 12. at the end; for stat. 1 and 2 Ph. and Ma. before-mentioned, repeals accusers at the trial in cases of treason only, and not in misprision. They agreed also, that petit-treason ought to be tried as high-treason, namely, by accusers at the indictment, but that there needed no accusers at the trial. In these resolutions the following persons concurred; namely, *sir William Portman*, chief-justice; *Mr. Hare*, master of the rolls; *sir Robert Brook*, *sir David Brook*, *sir Hunphrey Brown*, *sir John Widdon*, *sir Edward Sgunders*, *sir William Staunforde*, and *master Dalison*, justices; *Dyer*, serjeant; and *Griffin* and *Cordell*, attorney and solicitor-general. They agreed also, that counsellors who give evidence against traitors are not accusers; which was a resolution more in favour of the subject, than those which allowed the written accusations to supply the place of *viva voce* testimony. It may be added here, from *sir Robert Brook's* own words, that by the civil law accusers were as parties, and not witnesses; for witnesses ought to be indifferent, and not come till they are called; but accusers offer themselves to accuse; and conformably with this idea, our law had allowed it as a good challenge to a witness to allege, that he was one of the prisoner's accusers (a).

The judges in the above resolutions went on further than to agree upon the number of accusers; and to say

(a) We have before observed, that what is here said of accusers is wholly consonant to the principle of criminal proceeding in the canon law. *Vid.* ant. 505. *New Cases*, 76.

that their written accusation would be received as equally legal with their verbal evidence. In a formal trial, in the first year of the queen, it had been held, with regard to the credibility of the accusation, that it was sufficient for one of the accusers to speak of his own knowledge, or own hearing; and then having related the fact to another, that other person might be a good accuser under the act. Thus sir Nicholas Arnold, who accused William Thomas of treason in speaking words tending to the death and destruction of the queen, and made this accusation upon his own hearing, had, at the request of William Thomas, reported the same to sir James Croftes; sir James Croftes reported them to John Fitzwilliam, who was supposed a proper person to be employed to kill the queen; and he told them to sir Thomas Wiatt: here the court held every one of these persons to be a proper accuser: a determination, which made it wholly unnecessary to repeal the statutes of Edward VI. it being after this in vain to require fifty witnesses; for the same principle would have supplied any number from the knowledge of one alone (a).

In the same year it was declared, at the arraignment of sir Nicholas Throckmorton, and was repeated in the star-chamber to the jury (who were arraigned there for their verdict of acquittal), by the opinion of the justices, that where two or more conspired to levy war, or commit any other treason, and one of them executed it, this was treason in all (b).

It seemed to be a determination to strain the law of treason, as well private as public. It was laid down this same year, that if a son or daughter-in-law kill a father or mother-in-law, who furnishes board or lodging, and to whom they do necessary services, such a person, if indicted *proditore*, should be found guilty of petit-treason, though there were no wages paid (c). A case happened where a

(a) 1 Mar. Dyer, 99. 68.

(b) Ibid. 98. 56.

(c) Dal. 14. 1.

female servant and a stranger conspired to rob the master, and at the appointed time she admitted him into the house, and conducted him with a candle to her master's bed, where he killed him, the servant doing and saying nothing, but only holding the candle: it was a question, whether the servant was guilty of petit-treason, considering the stranger was principal actor, and only guilty of murder. The judges were divided upon it. *Portman* and *Brook*, the two chief-justices, with *Hare*, the master of the rolls, considered it as treason; *Brook*, chief-baron, with *Dalison* and *Staunforde*, justices, maintained the negative (a). A similar question had been decided in the affirmative in the time of Richard III. A man having seized on the sea some goods of an enemy, took them into a house, where he was attacked by a person pretending to have an authority from the admiral, and supported by a multitude of persons: a woman, without any weapon, issued out of the house, and was killed by one of the persons who came to take the goods, and had thrown a stone at another in the gate. It being a question whether this was murder, the justices and serjeants were divided; some thinking, that if she came out in defence of the house, it was murder in all the persons attacking the house; others, among whom were *Brook*, *Staunforde*, and *Dyer*, thought otherwise; for (say they) no malice was prepensed against the woman, and the imputation of murder cannot be extended further than the party's design. The former supported their conclusion by saying that if two were fighting, at an appointed time and place, and a stranger interfering to part them, was killed by one of them; this, conformably with some opinions as old as the reign of Edward III. was murder in the slayer; and some thought it was murder in both (b).

A case very much like this supposed one, had really happened in the first year of queen Mary's reign. This

(a) 2 and 3 Ph. and Mar. *Dyer*, 126. 57.

(b) *Ibid.* 128. 60.

was *Salisbury's* case. The jury upon the trial put this question, with relation to one of several that were indicted for murder, Whether if the defendant was in company with them who of malice prepense killed the deceased, and when he saw them combating together took part with them suddenly, without any malice prepense, and struck the deceased, together with the others, he was guilty of murder or manslaughter? to which the court answered, if he had no malice prepense, but suddenly took part with those who had, it was manslaughter, and not murder. The fact upon the evidence being, that the intention was not to kill the deceased, but his master, the judge laid down the law upon that head, namely, that killing one man upon a malice conceived against another is murder. There arose another point in this case, which must startle a modern reader, and is well worthy of observation.

We have seen in the reign of Henry VIII. Distinction between murder and manslaughter. that a man found guilty of manslaughter, on an indictment of murder, was by all the judges held guilty of the whole indictment, and was accordingly executed (a). In the present case, the jury found that *Salisbury* killed the deceased, but not of malice prepense; and so they acquitted him of the murder, and found him guilty of the manslaughter. Upon this, it was privately debated upon the bench, whether he should be intirely acquitted by this verdict, inasmuch as he was arraigned of murder, and was acquitted thereof; or whether he should have judgment to be hanged for the manslaughter; or, thirdly, whether this verdict should serve for an indictment of manslaughter, or what else should be done: and it was clearly the opinion of the whole court, that they might give judgment against him to be hanged for the manslaughter. In support of this, they said, that the jury might give a verdict at large, and find the whole matter; as if one was arraigned of the death of a man,

(a) Vid. ant. 393.

and he pleaded not guilty, the jury might find that he killed him in his own defence. In this case, therefore, where he was arraigned for killing a man with malice prepense, the substance of the matter was, whether he killed him or not; and the malice prepense was but matter of form, or the circumstance of killing. And though the malice prepense makes the fact more odious, and for this cause the offender shall lose several advantages which he would otherwise have, as sanctuary, clergy, and the like; yet it is nothing more than the manner of the fact, and not the substance. The substance and manner being both put in issue together, if the jury find the substance, and not the manner, judgment shall be given according to the substance. Though the court were clear in this opinion, they thought it better, as they were on the circuit, to take the opinion of the sages of the law, and in the mean time they granted a reprieve (a). What was finally done in this case does not appear.

This difficulty was occasioned by the late statutes of Hen. VIII. and Ed. VI. that had taken clergy from those convicted or attainted of murder of malice prepense; since which a distinction had arisen in point of privilege, and so of punishment, between felonious manslaughter, and felonious murder with malice prepense. Before these acts, if the jury had acquitted a prisoner of murder, and of the malice, yet there was still a felonious killing contained in the indictment, which could only be qualified by finding it to be *se defendendo*, or *per infortunium*. It appears from our oldest writers upon criminal law, that the only object in prosecutions of this sort, was to fix on the defendant the charge of felonious killing; namely, *nequiter et in feloniam et premeditato assultu fecit plagam mortalem, &c.*: this was therefore most truly the substance of the charge. Murder was in former times so very distinct a crime from felonious killing, that they could hardly be enquired of together; at least murder could never have been a subject

(a) Plowd. 100.

of enquiry before the jury who were to try the felonious killing; being always to be enquired of by a presentment of Englishery (a). We have before seen, that when these presentments were abolished by law, the term *murder* had lost all legal meaning or use; till, by degrees, it crept into indictments, and was adopted, at first, merely to aggravate the charge, which was thought then to sound more malignant, though it was not heightened in the eye of the law. However, such efficacy was attributed to this term, that in time it became, in its adopted sense, as technical as in its old one, and every indictment for felonious killing was required to allege *quodd murdravit*. At length this became the principal charge and git of every indictment: in the last reign it had been determined to *imply* malice; so that *murdravit* was sufficient, without the addition *ex malitiâ præcogitatâ* (b); a suggestion which was more anciently the indispensable requisite of all appeals and indictments for homicide.

When, therefore, *murder with malice prepense* had taken the place, as it were, of felonious homicide, and became the sting of such indictments, the common apprehension must be, that an acquittal of the murder and malice was an acquittal of the felonious killing. But when the statutes of Hen. VIII. and Ed. VI. had singled out *murder with malice prepense* as a mode and circumstance of killing which should no longer enjoy the benefit of clergy, the judges began once more to separate the legal ideas of murder and felonious homicide; and to say, as on this and another occasion which has been mentioned, that there still remained a felony in the indictment; and though the prisoner was acquitted of the murder, yet if the jury convicted him of killing (without adding the qualification of *se defendendo*, or *per infortunium*), they convicted him of a felony, for which he should have judgment to

(a) Vid. ant. vol. II. 28.

(b) 5 Ed. VI. Dyer, 69. 2.

die; and to this felonious killing they gave the name of *manslaughter*, and sometimes *chance-medley*. The former of these words, it is obvious, was only another term for homicide; the latter was to express a sudden affray, or scuffle, *chaud-mêlée*; it being under such circumstances, that the killing here meant to be signified most usually happened. Conformably with this new construction of the judges, homicide is thus divided by Staunforde, who wrote three or four years after the time of which we are now speaking. He says, that killing a man is either *justifiable*, or *se defendendo*, or *per misadventure*; and if it is not one of these three, it is *voluntary homicide*, which he subdivides into two; the more heinous species, called *murder*; the less heinous, called *chance-medley* (a).

The judges seem to have been governed in their construction of these statutes by technical reasons like those abovementioned; but, however artificial it might be in its commencement, the distinction between murder and manslaughter has been since upheld and explained upon the best and wisest principles of penal justice. A conviction of the frail state of humanity induces one to pronounce it a great defect in our old law, that no allowance was made for the passions of men: if a man was killed in a quarrel, or on a sudden affray, it was equally felonious as if by a deliberate act. But since the time of the above distinction, such an act, which could not be excused under the idea of self-defence, or misadventure; nor could, consistent with the feelings of the mind, as well as the dictates of plain sense, be stigmatized with the name of premeditated murder; might yet be subjected to a proportionate punishment, under the name of *manslaughter*, or *chance-medley*. It follows, that after this change of sentiment, much of what is delivered in our earlier writers and reports on questions of homicide, must be read with great

(a) Staunf. 19. a.

caution, as inapplicable to, and irreconcilable with, the notions which began to prevail from this time to the present day. This is remarkable not only in points that arise about a killing on a sudden affray, but more particularly in questions of *se defendendo*; the old law upon which is become almost unintelligible.

To return to the doubt of the judges upon the case before them. Notwithstanding the explicit manner in which they delivered their opinion, that the substance of the indictment was found, and that judgment of death should be given, they could not mean that the manslaughter of which he was convicted, and the murder of which he was acquitted, were the same degree of offence, and were to be equally punished by hanging; for they had themselves stated this difference, that murder was deprived of clergy, but manslaughter was not. It should seem then that the difficulty intirely arose from one of these circumstances; either that the party had deferred demanding his clergy till after judgment of death had been passed, or that he was not a clerk; or that the judges hesitated, not about the fate of the prisoner, but the form of entering the judgment. It is only in one of these ways, that the judgment of death here spoken of can be accounted for.

It is remarkable that the definition of *larceny* given by *Staufenforde*, is that which *Bracton* had formed so many centuries before; and this is laid down and commented on by *Staufenforde* as the law of his time; though this offence, in its legal consideration, had been much altered from the time of Henry III. and an entire new description was made of it, at least by the time of Edward IV. as we have seen in the former part of this History (a).

Robbery is defined by this writer to be, when a man takes any thing from the person of another feloniously, though the thing taken be not worth a penny (b); a defini-

(a) Vid. ant. vol. III. 410.

(b) *Staufn.* 37. a.

tion which later writers have narrowed, by restricting it to a taking with force, and a putting in fear. It was an opinion of justice *Hales* in 7 Ed. VI. that it was no felony to take a diamond, ruby, or other stone (not set in gold, or otherwise) because they are not of price with every one, though some hold them valuable and precious.

It was held in 4 Ed. VI. (a) that the breaking of a house shall not be burglary, unless it is by night. This is the first passage in any book where burglary is confined to a breaking by night (b). In the old books it is said to be the same, whether by night or by day. According to this late determination *Staunforde* has formed his description of this crime, collected from the many decisions since the time of *Brutton* and *The Mirrour*, which is to this effect: "*Burglars* are those who feloniously, in time of peace, break a house, church, walls, or towers, though they take nothing from thence; but then it must be done with intent to commit a felony, and in the night (c)." As to the circumstance and kind of *breaking*, the following point was resolved in 3 Ed. VI (d): A person was taken in the night putting back the leaf of a window with a dagger: this was held to be burglary. The like was resolved where a man was found drawing the latch of a door, which was not otherwise fastened (e). It was held, that *fregit* alone in an indictment was not sufficient, but it should be *fregit et intravit* (f).

According to *Staunforde's* definition, the breaking might be either of a house, church, wall, or tower. It was held, in 2 Ed. VI. that where a stable was near a house, and inheritable as parcel of a house, and it was broke by night with intent to rob, this was a burglary (g).

The law of principal and accessary always furnished some subject of argument and diffi- Trial of principal and accessary.

(a) Bro. Cor. 185.

(b) Vid. ant. 472.

(c) *Noclanter*. Staunf. 30. a.

(d) Lamb. Irenarch. 268.

(e) Ibid.

(f) 1 Mar. Dyer, 99. 58.

(g) New Cases, 75.

culty. In a case which happened at Shrewsbury at the same time with the above case of *Salisbury*, it happened that several were indicted for murder, and several others for being present aiding and abetting. The latter were the only persons in custody ; and it was submitted by sir Thomas Bromley, the chief-justice, to the others in the commission with him, whether these men should be arraigned ; for although they were principals as well as those who struck the blow, yet they were principals only in the second degree, in respect of the act of the others ; and if it should happen that these should be convicted, and then the others be tried and acquitted, a new difficulty and inconvenience would follow ; for they would be found guilty of abetting a fact that was never done ; and when it is recollected that in the old law persons present aiding and assisting were deemed to be accessories and not principals, he thought it deserved some consideration. After two days hesitation, the other justices were of opinion, that those who were aiding and assisting were in truth and fact, to all intents, as much principals as those who did the fact ; for they caused a terror in the party, and thus disabled him from resisting and defending himself, which was the same as giving the stroke ; it was therefore not proper to say, that the one were principals in deed, and the others in law, but they are all principals in deed and in the same degree. They said, therefore, that should the jurors give a special verdict, and find that the deceased was struck by another than the person alleged in the indictment to have struck him, and find these guilty of aiding and being present, the verdict would be a sufficient conviction. The same if those who gave the wound should die, the aiders who were present might be arraigned ; which shews they were equally principals, and not in the second degree. In this the chief-justice and the rest agreed, and the prisoners were accordingly tried (a).

(a) Plowd. 97.

A man was indicted as accessory both to the principals absent and those present; and *Bromley* started a doubt, whether he should be arraigned as accessory to the principals now present; for he could not be arraigned as accessory to those absent. If he was arraigned in this way, he might be acquitted of being accessory to those present, and yet he might really be accessory to those who were absent; but could not be a second time arraigned for the same fact; for though being accessory to one is not being accessory to another, yet the fact, which is the death of the deceased, is all one. The justices did not agree to this as a cause for deferring the arraignment: for they said, though he was arraigned as accessory to those present, and should be acquitted, he might well by law be arraigned as accessory to the others; but in conformity with the general practice, and the authority of a case in the book of Assises(*a*), they deferred the arraignment till he could be arraigned as accessory to all the principals together (*b*). *Plowden* remarks upon this practice of deferring the arraignment of the accessory till he could be arraigned as accessory to *all* the principals together, that it was more out of good discretion than necessity: it is, says he, to save the country the trouble of furnishing two or three juries, when one might do the whole; and he agrees with those who said the accessory if acquitted as accessory to one, might afterwards be tried as accessory to the others(*c*). We find in 4 Ed. VI. two cases, where a man who had been acquitted as accessory, was afterwards indicted of the same felony as principal; and notwithstanding his former acquittal, he was arraigned, convicted, and hanged. It does not appear whether this was an accessory before or after the fact (*d*).

Where five prisoners were arraigned together, and they did not join in their challenges, it was held, that though

(*a*) 40 Ass. pl. 25. (*b*) *Plowd.* 98. (*c*) 7 Hen. IV. 107. *Plowd.* *ibid.*

(*d*) *New Cases*, 75.

Latin; in performing which they imitated the style of the Roman laws with a happiness far beyond the composers of the pontifical law (a).

(b) After the taste we have already had of the law and practice of the ecclesiastical courts, we feel some curiosity to see what were the ideas of the reformers upon the same subject. On a view of their scheme of reformation, it appears that they worked upon the old materials, and were not precipitate in making any alterations of consequence. The canon and civil law, and the provincial and legatine constitutions, were still to be the ground-work of our ecclesiastical law. But these underwent some change and modification in certain articles.

The law of matrimony, adultery, and divorce, was intended to be almost wholly altered by the new scheme. For this purpose, in the first place, it was expressly laid down, that no promise or contract should be binding, but such as was made in the following way. The minister was to publish

Of marriage. the intended marriage on three Sundays, or at least feast-days; at the end of which the man and woman were to be present in the church while the ceremony, lately ordained, was performed: so that all the canonical learning about espousals and pre-contracts was at once done away. But to prevent the ill consequences that might follow to young women who had yielded to the promises and solicitations of men, the penalty of excommunication was denounced against those who were guilty of violating a woman's chastity: and if they would not consent to marry the woman, the ecclesiastical judge was to give to her a third part of his goods: if the goods could not be divided in that manner, he was to condemn him to take care of the child, and to undergo such penance as the judge thought necessary to expiate the scandal.

(a) Burn. Ref. vol. II. 185, 186.

(b) Vid. ant. 1, &c. 45, &c.

The marriage of children and orphans was declared void, if not contracted with the consent of their parents and guardians; but if these withheld their consent without sufficient reason, recourse might be had to the ecclesiastical judge, who was to decide on the propriety of the matter. A woman at twelve, and a man at fourteen, and not before, might marry. Marriage might be celebrated at all seasons; but it was to be in the parish where one of the parties inhabited, or the minister would be excommunicated. At the time of the ceremony any one might interpose, and shew cause why the marriage should not take place; and upon giving security to prove the cause within a month, or make satisfaction for all the expence of preparation for the marriage, the ceremony was to be delayed for that time; and neither party was to contract marriage during that month, under pain of excommunication, and compensation to the party so deserted. If there was a secret inability for the marriage-state in either party, the marriage was deemed to be null; otherwise if it was known. Deaf and dumb persons might marry, and those who were mad, in a lucid interval. There was to be no marriage with infidels. With these exceptions marriage was, upon this new scheme, allowed to all persons of what condition soever, and might be repeated. But this was not to give licence to polygamy; for it directs, if any person had more wives than one, he should retain only the first, if she would have him for a husband, and dismiss all the others with their dower, and make satisfaction to the church for his offence. The women also were to be punished, if they were conscious of the man having more wives than one.

After the marriage was concluded, if quarrels and bickerings arose between them, and they were unwilling to continue together, they were to be compelled by ecclesiastical censures to accommodate differences, and live in matrimonial harmony, unless those differences were of

such a nature as we shall hereafter see were grounds of a divorce. It was laid down, that any marriage contracted under the influence of force or fear should be void. Thus far of marriage in general (a).

The degrees within which marriage was prohibited, were those contained in Leviticus, ch. xviii. and xx. which they said was a rule not confined to the Jewish nation; but, like the decalogue, was to have authority with all Christian men. They therefore declared it to be impiety in the Roman pontiff to arrogate to himself the power to dispense with these divine prohibitions. As to the construction of these prohibitions, they said, many were only put for examples, and we must supply others, which stand in precisely the same situation: thus, for instance, if a son is not to marry his mother, so a daughter is not to marry a father. They therefore laid down two rules: first, that wherever males were mentioned, the same should be understood of females in the same degree of propinquity: secondly, that husband and wife made but one flesh; so that in whatsoever degree of consanguinity a person was related to the one, he was related in the same degree of affinity to the other. They retained the old notion of the canon law, and considered any illicit connexion as creating an affinity the same as marriage; and they held the impediment of affinity to continue after the death of the party. But they declared that all spiritual cognation was an invention not authorised by scripture, and therefore should no longer be an impediment to marriage (b).

The reformers of our ecclesiastical law prescribed very heavy penalties in case of adultery; founding this severe measure on the Jewish law; which directed such offenders to be stoned to death; and on the civil law, which punished them capitally. When a minister was convicted of adultery, fornication, or incest, his goods, if he was married, were all to devolve to his wife and children; if he had no

(a) Reform. Leg. Eccles. 37 to 43. (b) Ibid. 44 to 47. Vid. ant. 53, &c.

wife nor children, they were to be distributed to the poor, or applied to other purposes, at the discretion of the ecclesiastical judge: if he had any benefice, he was to forfeit it, and to be incapable of taking another: he was likewise to be sent to perpetual exile or imprisonment. A layman convicted of adultery was to restore to his wife her *dower* (a), and also half his goods; he was likewise to be condemned to perpetual exile or imprisonment. A wife, in like manner, if convicted of adultery, was to forfeit her *dower*, and all claim she had by law, or promise, on the effects of her husband; and was to suffer perpetual exile or imprisonment. Moreover, in such case the innocent party might contract another marriage: this second marriage they thought justified by the words of Christ, who made an exception of the case of adultery. However, they recommended that the guilty party should in charity be invited by the innocent to return to the conjugal state; and at no rate should be allowed to marry again. None was to put away his wife for adultery, and take another, till the ecclesiastical judge had heard and determined the matter; and if he did, he lost all right of proceeding against his wife. The judge, when he condemned the one of adultery, was to pronounce a liberty to the other to marry again: there was to be a time limited for such second marriage, as a year, or six months; during which if he did not return to his first wife, he might take another. If one of the parties withdrew from the other, and, after intreaty and remonstrance, would not submit to cohabit, the other might, upon authority of the ecclesiastical judge, have liberty to marry. If the absent person could not be found, then process was issued, and a term of two or three years was to be fixed by the ecclesiastical judge for him to appear and shew good cause of his absence; which if not done, the other party was absolved from the tie, and might marry again; and if

(a) The word in the original is *dos*; and as such is ambiguous in this passage, but less so in the following.

he afterwards appeared, he was to be confined to perpetual imprisonment. The ecclesiastical judge might proceed in the same manner, where the absence was on some lawful calling, if nothing had been heard of him for some time; and the other party might, in like manner, marry: however, if the absentee could give good reason for his being detained, his wife would be obliged to receive him again: if he could not shew good cause of absence, he would be punished with perpetual imprisonment, and the second marriage would be good.

If there was irreconcilable enmity between two married persons, so that one had plotted the other's destruction, it was a cause of divorce. If a husband treated his wife with severity, the ecclesiastical judge might use remonstrances, and then compel him to give security to treat her well. If this did not succeed, it must be attributed to irreconcilable enmity, and was therefore a good cause of divorce. The judge might proceed in like manner with women who were obstinate and rebellious. In all these cases the innocent party might marry; but the offender would be committed to perpetual imprisonment.

The reformers laid it down, that an incurable disease contracted by either party, should not be a cause of divorce. During a suit with his wife on the ground of adultery or ill-treatment, the husband was required to support her according to her condition. If the husband failed in a suit against his wife for adultery, he was to forfeit to her half his goods, and was afterwards to have no power to dispose of the goods so forfeited: the wife, if she failed, was to lose her *dower*, and all claim she had upon the husband's effects. If such action was brought by any stranger, he would not be admitted to church till he made compensation to the party calumniated. If the party convicted of adultery could prove the other to be equally so, they would both suffer the same punishment, and the marriage would continue still in force. The separation *a mens et*

toro was entirely taken away by the reformers, as productive of great abuses and scandal in the marriage-state (a).

While the reformers were projecting this change of the old law of separation *a mensâ et toro*, an incident happened respecting a distinguished personage, that led to the public discussion and decision of this very point. The marquis of Northampton had been separated from his wife on account of her adultery. This happened in the reign of Henry VIII. when it was considered, whether some relief might not be contrived for the innocent party, to whom separation was but a very partial, and sometimes a hazardous, redress. In the first year, therefore, of Edward VI. a commission of delegates was directed to ten persons, of whom some were bishops, to try whether the marchioness was not by the word of God so lawfully divorced, that she was no more the marquis's wife; and whether he might not thereupon marry again. As this was a new case, the delegates, to investigate it thoroughly, took longer time to give their judgment than that nobleman chose to wait; for he, in the mean while, was solemnly married again. As the first marriage still subsisted in law, this gave great scandal, and he was put to answer for it before the council; where he defended what he had done by saying, that all ties between him and his former wife were discharged by the law of God; that making marriages indissoluble, was a popish contrivance to get money; that separation only led to temptations; and the like. However, he was by that tribunal enjoined to part from his new wife till the delegates had given sentence, and then further order should be made in it. To this the marquis consented. In conclusion, after a long enquiry, the delegates, in the spirit of the designed reformation, actually determined in favour of the second marriage. Upon this the marquis was suffered again to cohabit with his wife; but afterwards, to

(a) Reform. Leg. Eccle. 47 to 56.

make all sure, he thought it advisable to get this sentence confirmed by a special act of parliament (a).

This was a severe blow upon the canon law; and it was thought proper, in queen Mary's reign, to repair the breach that had thereby been made. An act was brought in to repeal the statute made to confirm this marriage. It was much debated in the house of commons; and was at last, by various alterations, so qualified, that it threw no imputation on the parties, but only declared, that, in that particular case, the divorce was unlawfully made. The act at first probably contained a clause against all divorces of the same kind; many of which, no doubt, had been made in consequence of this precedent (b).

Of wills.

The reformers designed some alterations in the law of wills (c), the principal of which consisted in the following particulars. They allowed the liberty of making a will to all persons of either sex, and of every condition; but they excepted from this general authority all wives, *servi*, and minors under fourteen years, heretics, and those condemned to death, or perpetual exile, or chains; which two latter punishments we have seen were very commonly inflicted in this new system of jurisprudence. Those who did not dismiss their concubines before they were *in extremis*; those who had two wives, or two husbands; those convicted of *famosi libelli*; those who were prostitutes or procuresses, unless they had undergone temporal punishment for their crimes; those guilty of usury, unless they had refunded or made satisfaction, or taken measures for so doing; all these were prohibited from making wills. However, they allowed persons who kept their concubines, or had two wives, or two husbands, to dispose of their goods *in pias causas*; and the like indulgence was given to usurers who had made no restitution, and to those who had been prostitutes or procuresses.

(a) Burn. Ref. vol. II. 53, 54.

(b) Ibid. 237.

(c) Vid. ant. 66.

The articles which they reckoned within the description of *piæ causæ* were these: in addition to the relief of prisoners, and of the poor, the assistance of orphans, widows, and afflicted persons of all sorts, as was required by our old law, they particularly pressed these objects; to promote the marriage of young women, the support of students in the universities, and the reparation of highways. If any disposition rather of a superstitious than pious nature was made, the bishop was to interpose his authority, and see that it was applied to some *piæ causæ* (a).

The division of the deceased's goods, whether by will or without (b), was required to be in this manner. If he had a wife and children, a third was to go to the wife, a third to the children, and the other third was to be at his own disposal. If he left no will, the wife and children were to take their thirds, and the administrator distribute the other third. If there were no children, the widow had half, and the other was to be at his own disposal; or, if he died intestate, at the disposal of the administrator; the same if he left children, but no wife. The children were all to take equally, unless the father had ordered it otherwise in his will. If the child died, then his share was to go to his children, if he had any. Thus was the law of distribution, which had been subject to much doubt and difference of opinion and practice, in a fair way of being ascertained, if this scheme of reformation had ever taken place; for it is laid down, that even in case of a will the children were entitled to a third, or a half, which was to be divided equally between them; but the father might, if he pleased, apportion that third, or half, between them as he liked.

They went on to declare, that no son should be passed over in his father's will, unless he was expressly disinherited in plain terms; and such disinheritance would not be good, unless it mentioned some just cause for such a measure. These causes were thus enumerated by our legislators: if

(a) Vid. ant. 80.

(b) Vid. ant. 79.

a son had laid violent hands upon his father ; if he had injured him in any signal manner ; if he had prosecuted him for a crime, through malice, and not for the good of the state ; if he had laid snares for the life of his father or mother ; committed incest with his step-mother, or father's concubine ; if he had calumniated his father's good name, or wasted his property ; if he had refused to be security for his father. A daughter might be passed over in a will, if she had become a common prostitute while the father was offering her a reputable marriage ; for if a father neglected his daughter till she was twenty-five years old, without preparing her a proper match, this omission in the parent would absolve the daughter, say these reformers, from any imputation of offence, so as to preclude him from putting her out of his family, or passing her over in his will.

In like manner, a wife was not to be excluded from the husband's will, without some delinquency on her part ; as if she had used violence against him ; had contrived any ill against him ; had attacked his fame or fortune by calumny and false accusations ; had exposed his daughter to temptations ; or had absented herself from him. Both wives and children, if they obstructed the father and husband in making or altering his will ; if they did not protect him when afflicted with disease, nor ransom him when captured ; or if they became heretics ; they might be passed over, as objects unworthy to enjoy any part of his property.

They declared that the following persons should not be qualified either to become executors, or to take any benefit under a will : heretics ; those condemned to death, perpetual exile, or imprisonment ; those who kept concubines ; those who had two wives, or two husbands ; those convicted of procuring or publishing *libelli famosi* ; procuresses and common prostitutes, and usurers : and the delinquency of the above persons was not to be estimated at the time of making the testament, or the death of the

testator, but at the time of taking the executorship, or receiving the legacy (a).

There had always been a latitude in the description of persons to whom the ordinary was to commit administration. We have seen (b), that this was reduced to some sort of precision by a stat. of Henry VIII. and the intended regulation seems to have this last provision in view. For it says, that when a person died intestate, the wife should be the first to have the administration; in the next place, those who were nearest of blood; and if the judge pleased, he might unite these with the wife in the administration. If there were several in the same degree of propinquity, the judge was at liberty to appoint one or more as he pleased.

Several directions are given for the granting of administration, the payment of legacies, the fees of ordinaries, and the like; most of which seem to correspond with the practice of the ecclesiastical court in former times: and finally this new scheme directs, that in all matters of controversy, upon the numberless questions, to which wills were liable, and which were not here ascertained or provided for, recourse should be had to the body of Imperial law.

The other great object of ecclesiastical cognisance, the payment of tythes, does not seem to have undergone any considerable change in this intended reformation; the compilers appear to have proceeded, in what they ordained, wholly upon the ideas of our provincial constitutions, many of which are copied almost in the very words. Among other regulations, it requires the late statute of Ed. VI. (c) concerning the payment of tythes, and the old act about *sylva cadua*, to be observed (d). There is only one more article of ecclesiastical jurisdiction which we shall

(a) Reform. Leg. Eccle. 129 to 135.
and 3 Ed. VI. c. 19. Vid. ant. 458,
to 124.

(b) Vid. ant. 206. (c) Stat. 2
(d) Reform. Leg. Eccle. 105, 106

mention, and that is *fidei lesio*, that has been so often considered in the various disputes between the spiritual and temporal courts (a). It seems to have been intended by the reformers, that no consideration should be had of the object in question; but that, whether it was of a lay or a clerical nature, suit for the breach of faith should be entertained in this court. They declare, that whatsoever agreements and promises were not fulfilled nor performed, whether there was an oath taken by the parties, or only a strong affirmation made, those who did not keep their faith should be pursued with ecclesiastical censures, and compelled to make satisfaction to the parties who were deceived by their perfidy (b).

Without entering any further into the detail of this projected reformation of our ecclesiastical law, it may suffice to subjoin a brief enumeration of such causes as they meant should be considered as ecclesiastical, and to be heard and determined no where but in this court: causes beneficiary, matrimonial, and of divorce; causes testamentary, and for the administration of intestates' effects; for subtraction of legacies, mortuaries, tythes, oblations, and other ecclesiastical rights; for usury, heresy, incest, adultery, fornication, sacrilege, perjury, blasphemy, *fidei lesio*, defamation, and scandal; laying violent hands on a clerk; disturbance of divine service; for correction and reformation of manners; accounts of churches and church-wardens (c); dues owing to churches and their ministers; reparation and dilapidation of churches, church-yards, and other ecclesiastical edifices. In these causes, and their incidents arising from or depending upon them, and in all other causes relating to the correction of sins, the ecclesiastical judge, and no other, was to have jurisdiction to hear and determine (d).

(a) Vid. ant. 98.
sinarum et economorum.

(b) Reform. Leg. Eccle. 208.

(c) *Computus eccle-*

(d) Reform. Leg. Eccle. 195.

No period in the English history furnishes ^{King and go-} more instances of an irregular and undefined ^{vernment.} constitution than the reigns of Edward VI. and Mary. Many of the extravagant proceedings of Henry VIII. are rather to be attributed to wilfulness, and a tyrannical spirit. These incentives no longer operated; yet, under the gentle sway of his son and the Protector, the same prerogatives were exercised, with no other difference than that of their motives and objects. The acts of the council seem to have been received with the same acquiescence as those of Henry; and the commons, though not held in the same awe as during his reign, did not however shew greater spirit in asserting their privileges, or discover any better sense of what extent those privileges were.

So prevailing was the opinion of the great prerogative possessed by our monarchs at this time, that the Scots made it one of the principal objections to marrying their young queen with Edward VI. that all their privileges would be swallowed up by the great prerogatives of the English crown. This notion had so spread abroad, that the emperor, in conversation with the English ambassador, maintained the king of England's prerogative to be greater than that of the king of France.

The first act of the regency appointed by Henry VIII. was to alter the government which that king, under authority of an act of parliament, had made by his will. They delegated all their power to the duke of Somerset, under the title of Protector. This, however, was thought not sufficient foundation for his authority; and a patent was procured from the young king, by which this revolution was considered as completely confirmed and legal. The duke was thereby invested with regal power, and a council was appointed, with whom he was to advise. This usurpation was acquiesced under by parliament and the nation, without any scrutiny into its validity.

The act of Henry which gave the force of laws to the king's proclamations, was made to have force during the young king's minority. Of this the Protector availed himself; and proclamations were issued on many occasions, where they could be applied to promote the great design of the Reformation. By one proclamation the jurisdiction of the bishops was suspended; while commissioners were appointed, part clergy and part lay, to make a general visitation in every diocese. After this law had been repealed (*a*), the Protector still issued proclamations, which, in their nature, could hardly be considered as less than new laws; such as forbidding many ancient superstitions, and making material alterations in the national worship.

Proclamations had, from very early times, been the usual method by which our kings had signified their commands, and enforced their authority. They were framed for the purposes of government and of the state. They seemed a necessary part of the executive magistrate's power; and having grown up with the monarchy, they might in those times be looked on with reverence by the people, without discovering how nearly they approached to acts of legislation. But the dispensing with positive laws was an act of a more unequivocal kind; and this power was exercised by Edward VI. or rather by the Protector, in more instances than one. The Protector procured a patent, enabling him to sit upon the throne, and enjoy those honours and privileges usually bestowed on princes of the blood: this was a plain dispensation with the statute made in the last reign to settle precedency (*b*). On another occasion, when the convocation found themselves restrained in their debates by the statute of the six articles, the king granted them a dispensation of that law before it was repealed, as was actually done soon after (*c*).

(*a*) By stat. 1 Ed. VI. c. 2. (*b*) Vid. ant. 223. (*c*) Hist. vol. IV. 300.

The last act of this king's reign had an extraordinary appearance: he was prevailed on to alter the succession of the crown (founded on an act of the last, and confirmed by one of the present, reign) by patent. The judges were required to draw an instrument to this effect; but knowing the penalty of treason was denounced on those who aided in changing the succession, they at first refused. The king said he meant it should be ratified by parliament; which, no doubt, would have been accomplished, if the king had survived long enough (a).

At the beginning of this reign the bishops were constrained to take out new commissions, of the same kind as those they had in the latter part of the last reign; by which they submitted to hold their bishopricks during the king's pleasure, and were to exercise the episcopal function as his delegates, in his name, and by his authority (b). This alteration was designed to forward the Reformation, by keeping in dependence those bishops who still adhered to the old superstition.

Upon occasion of the insurrections about inclosures, and other subjects of complaint among the people, *Somerset*, who always aimed at popularity, appointed a new sort of commissioners, whom he sent every where with unlimited power to hear and determine all causes about inclosures, highways, and cottages (c). This created some clamour among the gentry, who looked on it as illegal and arbitrary. It was in the same spirit that *Somerset* had erected a court of requests in his own house, for the relief of poor suitors (d). There he used to hear complaints; and, in consequence of what passed there, it sometimes happened that he would intercede with the judges in matters depending before them. This raised more scandal than the commission above-mentioned; and though he by such

(a) Hum. vol. IV. 363.

(c) Hum. vol. IV. 399.

(b) Burn. Ref. vol. II. 5.

(d) Id. ibid. 325.

means grew into great favour with the populace, he drew upon himself a proportioned degree of odium from the nobility, who soon shewed him how able they were to defeat all the support he might hope from the people.

With so many precedents of extraordinary prerogatives before her, it cannot be wondered that Mary, who had in contemplation to abolish the late innovations, should make use of such ready instruments to effectuate it. Governed as she was by a natural sourness of temper, heightened by her bigotry to the catholic religion, it is not more surprising that such designs were followed with many oppressive acts of sovereign authority.

To supply the scantiness of her parliamentary grants, Mary revived the irregular method of raising money by loans; projects which there had been no need of attempting during the reign of Edward. She levied at one time, in this way, 60,000*l.* upon a thousand persons, who, she thought, would most readily comply. At another time, she levied the same sum on 7000 yeomen, and 36,000*l.* on the merchants. She published a proclamation, prohibiting, for a certain time, the exportation of cloths; intending by this practice to induce such to comply, whose interest would be thereby affected in the foreign markets (a). She used to levy subsidies, granted by parliament, before the stated time. She issued privy-seals for the same purpose of raising money; and seized corn to victual her ships, without paying for it.

Proclamations of an arbitrary import were often issued. One of these was, to enjoin those whose circumstances had been affected by the loans, and who on that account had discharged some of their servants, to take them back to their service, because they had become vagrants and thieves (b). Others were issued against books of sedition, treason, and heresy. Those who had any of these

(a) *Hum.* vol. IV. 423, 424:

(b) *Id.* *ibid.*

books, and did not presently burn them, without reading or shewing them to any person, it was declared by proclamation should be esteemed *rebels*; and without any further delay should be executed by martial law (a).

As an auxiliary to the bishops' court, a special ^{New commis-} commission was appointed by the queen's pre-^{sions.} rogative, with extraordinary powers. It consisted of twenty-one persons, and any three had the authority of them all. The commission says, "That since many false rumours
 " were published among the subjects, and many heretical
 " opinions were also spread among them; therefore the
 " commissioners, or any three of them, were to make en-
 " quiry, either by presentment, by witnesses, or any
 " other *politic* way they could devise; and to search after
 " all heretics, the bringers in, the sellers, or readers of
 " all heretical books. They were to examine and punish
 " all misbehaviour or negligences in any church or chapel;
 " and to try all priests that did not hear mass, or come
 " to their parish-church to service; that would not go in
 " procession, or did not take holy bread or holy water:
 " and if they found any that obstinately persisted in such
 " heresies, they were to put them into the hands of the
 " ordinaries, to be proceeded against according to law;
 " giving them full power to proceed as their discretions
 " and consciences should direct them, and to use all such
 " means as they could invent for the searching of the pre-
 " mises; empowering them also to call before them such
 " witnesses as they pleased; and to force them to make
 " oath of such things as might discover what they sought
 " after (b)."

Instructions were also given to justices of the peace,
 " That they should call secretly before them one or two
 " honest persons within their limits, or more, at their dis-
 " cretion, and command them by oath or otherwise, that

(a) Hum. vol. IV. 419.

(b) Burn. Ref. vol. II. 323.

“ they shall secretly learn and search out such persons as
 “ shall evil-behave themselves in church, or shall despise
 “ openly by words the king’s or queen’s proceedings, or
 “ go about to make any commotion, or tell any seditious
 “ tales or news; and also that the said persons, so to be ap-
 “ pointed, shall declare to the same justices of the peace
 “ the ill-behaviour of lewd disorderly persons, whether it
 “ shall be for using unlawful games, or such other light
 “ behaviour of such suspected persons. And that the said
 “ information shall be given secretly to the justices; and
 “ the same justices shall call such accused persons before
 “ them, and examine them, without declaring by whom
 “ they were accused. And that the same justices shall,
 “ upon their examination, punish the offenders according
 “ as their offences shall appear upon the accusation and
 “ examination, by their discretion, either by open punish-
 “ ment or by good abearing (a).” Thus were justices di-
 rected to stretch the limits of their jurisdiction, in order
 to punish facts which were no crimes, after a trial authorised
 by no law.

To carry the execution of these designs still further,
 letters were written to the *Lord North*, and others, to put
 such obstinate persons as would not confess, to the *torture*,
 and there to order them *at their discretion*; and a letter
 was written to the lieutenant of the Tower to the same
 effect. Whether this pretended obstinacy was a concealing
 of heretics, or of the reporters of false news, does not
 appear. Whatever the pretence was, the putting people
 to the *torture*, because they were thought obstinate and
 would not confess; and the leaving the degree of it to the
 discretion of those appointed for their examination; were
 great steps towards the most rigorous part of the
 proceedings of the inquisition (b).

(a) Burn. Ref. vol. III. 247.

(b) Ibid. 243.

While informers and spies were encouraged, the prisons were filled with persons of all descriptions, who had incurred the displeasure of the court. When some of Mary's oppressions in raising men and money had created an uneasiness and clamour in the nation, she endeavoured to prevent such ill-humours from getting to any height, by throwing into the Tower some of the most considerable gentry. That such prisoners might not be known, they were, some of them, carried thither in the night-time; others were hoodwinked and muffled by the guards who conducted them (a). To prevent any one from daring to reflect on such proceedings, she struck a terror into the house of commons, always obedient enough to the court, by imprisoning their members for freedom of speech: and when some had seceded from parliament, she directed them to be indicted for it in the king's bench (b).

The few trials for offences which have come down to us, must be taken as evidences of the practice of our courts in those times, and, as such, are very striking events in the history of our law.

The proceedings against the duke of Somerset in the reign of Edward VI. are worthy of notice. The indictment was for treason and felony. Upon the trial, the prosecution was supported, as usual, by depositions, without confronting one witness with the prisoner; a conduct which was at length thought so extremely repugnant to common justice, as to become the immediate cause of stat. 5 and 6 Ed. VI. which we have already so often mentioned. This prosecution is on other accounts worthy of observation. The duke was acquitted of the high-treason; and that part of the indictment is held by lord Coke to be ill, because the overt act was laid only generally. The other part was grounded upon the late statute 3 and 4 Ed. VI. c. 5. which made it felony to call

Trial of the
duke of
Somerset.

(a) Hum. vol. IV. 432.

(b) Ibid. 403. Vid. ant. 203.

together persons to the number of twelve, with the intent to commit certain acts of violence therein mentioned; among which, that of imprisoning a privy-counsellor is one. The charge was, for attempting in this manner to imprison the earl of Warwick.

The common stories of this proceeding inform us, that he was acquitted of the treason, and found guilty of the felony; so it is related in king Edward's journal; and he was upon that attainder beheaded. Lord Coke remarks upon this attainder and execution, that the truth concerning it is contrary to some of our chronicles, and the vulgar opinion; and in some points contrary to law. First, as to the notion that he was wrongfully executed, and ought, by law, to have had his clergy; he says, that clergy is expressly taken away by this statute. Secondly, as to the opinion that he was indicted on stat. 3 Hen. VII. c. 14. for going about to *procure the death* of the earl of Warwick; he says, he was indicted for endeavouring to *take and imprison* that nobleman, as plainly appears from the indictment (a). Again he remarks, that being attainted but for felony, he could not, by law, be beheaded (b). Those who thought the duke was wrongfully deprived of his clergy, or rather (as it was said) that he never demanded it, and that it was not to be granted by the court but upon prayer, founded their remark upon a supposition that the indictment was upon the above-mentioned statute of Henry VII. which makes that offence only single felony.

Of sir Nicholas Throckmorton. On the trial of sir Nicholas Throckmorton, in the next reign, the counsel for the crown proceeded in reading confessions of absent persons, and putting the prisoner to answer to them severally, as they were read. This kept him constantly engaged, through the whole trial, in a sort of altercation with the crown-lawyers; whose de-

(a) Coke's Ent. 3 Inst. 13.

(b) 3 Inst. 13, 13.

portment, it should seem, very ill corresponded with the decorum to be observed on such occasions. Only one of the deponents was produced, and that was to swear him to the truth of his deposition. The prisoner did not object to this mode of proof, any otherwise than that since stat. 5 and 6 Ed. VI. there should be two witnesses to prove a treason; which remonstrance, for reasons which have been considered, was on this and all other occasions disregarded (a). The only witness produced to give evidence *vidâ voce*, was called by Throckmorton himself, and was rejected by the court.

The prisoner, who was very able to cope with the lawyers on the part of the prosecution, prayed that he might have the use of a statute-book; which was denied him, notwithstanding he pressed on them the plain injunction of the queen, lately delivered to her judges, to administer justice indifferently. He also reminded them of her direction, that, in criminal prosecutions, they should break through the ancient usage; and always hear witnesses, examined in behalf of prisoners, as well as against them. The harshness he experienced both from the bench and the counsel, had not the intended effect; but, on the contrary, perhaps prejudiced the jury in favour of an oppressed man: they acquitted him of the indictment. But the virulence of the prosecutors did not end here; for other circumstances, that deserve to be remembered, attended this transaction. The attorney-general, after the acquittal, prayed the court that the jury might be bound in recognisances to answer for their verdict. They were soon after fined and imprisoned by a sentence in the star-chamber: they were to pay one hundred marks a-piece, and to be imprisoned till further order. It was some months before they were released, and then not without paying different compositions, according to the

(a) Vid. ant. 494.

value of their effects; which had, in the mean time, been all inventoried and appraised by the sheriff for the purpose (a). Such was the security which might be reposed in this boasted privilege of trial by a jury of equals; and such the perils under which a jury exercised its own judgment, in opposition to the inclinations of the sovereign. During the reign of the star-chamber, the persons of jurors were no more exempted from animadversion than those of common individuals; every thing was reduced to the same level of subordination.

Bills of attain- The proceedings against *lord Scymour*, in the
der. reign of Edward VI. shew how the opinions of men were now altered respecting bills of attainder. Articles were drawn up against that nobleman; which, it appears by the council-book, were fully proved by witnesses, and by letters under his own hand. He was sent to and examined by some of the council; but he refused to give any *direct* answer, or to sign such as he had given. It was then resolved, that the whole council should go the Tower and examine him. When they attended him, the answer he made was, that he expected an open trial, and his accusers to be brought face to face. After this fruitless attempt, it was determined to proceed in a parliamentary way. Accordingly a bill was brought into the house of lords for attainting him of treason. This the peers easily passed, in the manner they had been accustomed to in the reign of Henry VIII. However, some show of justice was observed. All the judges and the king's counsel delivered their opinion, that the articles were treason: then some of the lords were produced as witnesses, who gave their testimony so fully, that all the rest with one voice assented to the bill.

When the bill was sent to the commons, it was accompanied with a message, that, if they desired to proceed as the lords had done, such of them as had given evidence

(a) *Sta. Tri.* vol. I., p. 78.

before the upper-house, should come down and declare it to the commons. In this house the bill met with some opposition. Many argued against attainders in the party's absence: they said it was a strange way of proceeding, that two or three peers should rise up in their places, and say somewhat to the slander of another, and that he should be thereupon attainted. It was pressed, therefore, that there should be something like a trial; that the lord-admiral should be brought to the bar, and be heard for himself. But here the king interposed; and informed the commons, by message, *that there was no necessity of sending for the admiral*. The commons, as usual, gave ready obedience to the pleasure of the court, and passed the bill with four hundred voices for it, and not more than ten or twelve against it (a). However, a view of this proceeding against lord Seymour shews, that this extraordinary way of condemning was not entirely relished by the parliament.

Afterwards, when the bill of attainder of misprision of treason against *Tunstall* bishop of Durham was sent by the lords to the commons, with all the evidences, which were depositions exhibited to the lords, the commons resolved to discountenance such a practice, and would not, at that time, proceed upon it. At another day, they ordered the privy-counsellors in their house to move the lords, that his accusors and he might be brought face to face (from which we may conclude, that the examinations which produced the depositions had been, as they generally were, *ex parte* in the star-chamber); but that not being complied with, *they would not pass the bill* (b).

In the reign of queen Mary, the attainder of the *duke of Norfolk*, which had passed in the latter end of Henry VIII. was represented as null and void; as well on account of other informalities, as *because* no special matter was alleged against him, except the wearing of a coat of arms

(a) Burn. Ref. vol II. 95, 94.

(b) Ibid. 185.

which his ancestors had, many years before him, worn without offence (a). However sanguinary this reign was in criminal proceedings for heresy, the court never received any assistance in its schemes of resentment from the parliament; which passed no bills of this kind, except the following may be considered in that light.

The statute of Edward VI. which took away clergy from principals in murder, had left accessaries to enjoy the impunity they derived at common law from the benefit of clergy. It happened in 3 and 4 Phil. and Ma. that one *Rufford* had hired two persons to murder one *Bennet Smith*. This is said by the act in question, to be one of the most detestable murders ever known in England. The wife of *Rufford* petitioned the house of commons, that *Smith* might by act of parliament be deprived of his clergy; Upon this, the commons sent to the queen, praying that she would order *Smith* to be brought from his confinement in the Tower to the bar of the house. He was accordingly brought, when the other parties confessing the whole of the matter, and *Smith*, at length, doing the same, the bill was passed. But when it was sent up to the lords, it was there strongly opposed, particularly by the clergy, who would not readily consent to any diminution of their ancient privileges: however, at last it got through that house, and received the royal assent. The next year, we have seen, there was a general law made, taking clergy away from accessaries before the fact, in murder, and other crimes (b).

There had been before, in this reign, an instance of an *ex post facto* law. It being suggested to the parliament, that the congregations in the city had prayed God to convert or confound the queen; it was thereupon enacted, that whosoever *had* so prayed, or should so pray in future, should be taken for a traitor.

(a) Hum. vol. IV. 374.

(b) Stat. 4 and 5 Ph. and Ma. Vid. ant. 491.

The principal oppressions in these two reigns, whether by summary and illegal trials, by imprisonment, confiscation, execution, or otherwise, were occasioned by the alterations in religion; and these were carried to extraordinary, though not to equal, lengths, both by protestants and catholics, according as each party had, in its turn, the aid of the executive power.

In the reign of Edward VI. when the king's councils, in matters of religion, were principally directed by the candid and gentle spirit of *Crammer*, the government was sometimes trans-
Judicial proceedings on account of religion.

The proceedings against *Gardiner*, bishop of Winchester, were very severe, and on very slight grounds. He had been enjoined by the council to inculcate, in a sermon, the duty of obedience to a king during his minority. He neglected to comply with this; and had, on that account and no other, been thrown into prison, where he lay two years. At the end of that period, the lord treasurer, and other privy-counsellors, went to him at the Tower, and presented him with certain articles, containing most of the points of the reformed religion, to which they required his assent. With all these he promised an entire compliance, if he was suffered to be at large, excepting only one article, which contained an acknowledgment of his own delinquency: but they persisted in requiring his subscription absolutely to the whole. He still refused. Upon this the income of his bishopric was sequestered, and he was required to conform himself to their orders within three months, under pain of deprivation, and being confined to a closer custody.

All this was much censured at the time, as illegal and inquisitorial. A man shut up in prison upon a complaint only; and without any further enquiry, after two years, required to give his assent to articles of faith! However, some reasoning from the canon law, and the way of pro-

ceeding *ex officio*, were thought to give a colour to this transaction; and in some degree to excuse, if not to justify, the hard measure this prelate suffered (a).

At the end of three months, a commission was directed to some bishops and others, clergy, laymen, and lawyers, to try Gardiner. As there had been no regular charge at first, this was a short business. He appealed from the commissioners to the king, objecting to this tribunal as illegal. The appeal was disregarded, and sentence of deprivation was passed upon him by the commissioners. His books and papers were seized; he was secluded from all company; and was not allowed to send or receive any letters or messages (b). Tunstall and other bishops were deprived by commissioners of the same kind; which prelates were all again restored by a like act of power in the reign of Philip and Mary, by a sentence of commissioners appointed to review the process and condemnation (c); and the sentence was justified, as under a regular proceeding *ex officio*.

The method of proceeding in the bishops' court, for heresy, was, to the last degree, oppressive and insidious. They used to exhibit to the accused person certain articles, consisting of such points of faith which they knew he had his doubts about, or was reputed to deny; and if he did not declare his assent to them, there was an end of the enquiry: he was condemned and executed.

There were two executions for what was called heresy, in the reign of Edward VI. These sufferers were anabaptists; but those in queen Mary's reign were so numerous, as to render the short time in which this persecution raged, one of the bloodiest in the history of the church. The cruelties exercised on the living have filled volumes with melancholy relations; but the prosecution of the dead, which was instituted by the visitors of the university of Oxford, is a singular piece of legal process.

(a) Burn. Ref. vol. II, 144.

(b) Hum. vol. IV, 345.

(c) Ibid. 375.

Bucer and *Fagius*, two foreign reformers, there buried, were cited, in the true spirit of the canon law, to appear and defend themselves; and after three citations, the dead bodies not rising to speak for themselves, and none coming to plead for them, for fear, as *bishop Burnet* observes, of being sent after them, the visitors proceeded *ex parte*. They examined witnesses concerning the heresies they had taught, and adjudged them obstinate heretics; ordered their bodies to be taken out of their graves, and to be delivered over to the secular arm. A writ issued out of chancery for the execution of this sentence; their bodies were taken up, and, being carried in coffins, were tied to the stakes, with many of their books and heretical writings, and all burnt together (a).

The decisions of courts in the reigns of Edward VI. and queen Mary, are to be found in *Dyer*, who reports all through these two reigns; as also do *Benloe* and *Dalison*. Some few cases are to be found in the collectors *Jenkins* and *Keilway*; some in *Moore*; and a few, but those very important, in *Plowden*. There are some cases of these two reigns in *Leonard*, and some, towards the latter end of Philip and Mary, in *Owen*.

Staunforde's Pleas of the Crown was the first Staunforde. work which treated the subject of criminal law professedly, and in detail. This book is written in French; the method of it is perspicuous, and the matter disposed with learning and accuracy. The author is uncommonly full in his quotations; the statutes are generally given at length; and whole pages are frequently transcribed from *Bracton*. Notwithstanding the alterations we have seen the criminal law undergo since the reign of Henry III. yet Staunforde has ventured perpetually to recur to this ancient writer as an authority, and has condescended to take from him many complete chapters. This is in general done with success and propriety; though sometimes his author has failed

him; as, among other instances, may be observed of Bracton's definition of larceny, which, as we before observed, was not law at the time Staunforde wrote (a).

In the account which this writer gives of crimes, his method is to begin by stating what they were in *Bracton's* time, and then to add the subsequent decisions which had affected the old law; at other times he entirely relies on his favourite author. This is done in a compendious way, without enlarging much on any parts of the subject. On the whole, he seems to aim at nothing more than digesting in a clear manner what could be collected from others.

As Staunforde has the praise of being our earliest writer on pleas of the crown; so has his merit been acknowledged by those who have followed him in the same walk; they having, in general, adhered to the arrangement and divisions of his work. He divides his subject, as falling under three considerations: first, of crimes; next, of the method of bringing delinquents to justice; and lastly, of trials and punishment. The several titles into which these are subdivided, have furnished the heads of every book which has been written since his time, on the same subject. This treatise is not voluminous; and when the quotations out of Bracton, and the statutes, are taken from it, the book is diminished more than half.

We cannot but feel a secret pleasure when we find an author, to whom we have before been under such obligations, in repute with a judge of eminence and learning upon points of modern practice. After the lapse of three centuries, it was hardly to be expected that we should be called upon to renew our acquaintance with Bracton; and Staunforde is intitled to our acknowledgment for the strong testimony he has given in later times to the intrinsic merit of this father of the English law. Bracton seems to have been a great authority with *Staunforde*; for it appears from the reports, that he ventured to cite and argue from him

(a) Vid. ant. 538.

upon the bench, at a time when it was the fashion to consider Bracton and Glanville not as authors in our law, but to be quoted, if at all, only for ornament in discourse (a); and for consonancy and order, where they agreed with better authorities (b).

The press was not idle during these two reigns, but produced several works of use to the practising lawyer. William Rastell published, in 1559, a collection, in English, of the statutes now in force, from *Magna Charta* to the 4th and 5th of Philip and Mary (c). In 1553, there came out an abridgment of the book of assises (d).

Thomas Berthelet, who had a patent of the office of king's printer for life, died in 1555. After this, in 7 Ed. VI. there is found a special licence to Richard Tottel (or Tottel, whose name like many others of this time was variously spelt), for him and his assigns to print for seven years all manner of books of the temporal law, called the common law, so as the copies were allowed and judged proper to be printed by one of the justices, or two serjeants, or three apprentices of the law, one of whom was to be a reader in court; and no one was to print what he had first printed, under pain of forfeiture of such books. A licence for the same term was also granted him in 2 and 3 of Ph. and Ma.; and in 1 Eliz. he had a similar licence for his life (e). By Tottel, and by other printers, in these two reigns, most of the books printed in the reign of Henry VIII. were reprinted; but

(a) Plowd. 357, 358.

(b) Such is the manner in which *Saunders* and *Calline* deliver themselves, in the argument of *Stonell versus Lord Zouch*, in the 11th of Elizabeth. Such a judgment upon these ancient writers might be very discreet and just at the time; but I was astonished to find Fitzherbert inform us, that it was agreed by the whole court in 35 Hen. VI. that Bracton was never taken for an author in our law. It was a pleasure to discover that the Year-book had given him no warrant for this monstrous opinion. The readers of Abridgments have been long aspersing the reputation of Bracton with more success than authority.

(c) Typ. Antiq. 474.

(d) Ibid. 810.

(e) Orig. Jurid. 59, 60.

Typ. Antiq. 806.

such different editions would be too tedious to enumerate. The editions, however, of such books as had never before reached the press, are worthy of notice. Among such are the following: In 1555, was printed by Tottel, a book intitled, *Ange Regis Henrici septimi*; containing some year-books of that king; respecting which he informs us, that the first and second were from a new collation; and that the 10th, 11th, 13th, 16th, and 20th, had never before been published (a). Some time about 1553, was printed a tract of sir John Fortescue with the following title, *De politica Administratione et Legibus civilibus florentissimi Regni Angliæ Commentarius* (b).

Miscellaneous facts. In this age of reformation, an act was passed through the house of commons in 1549, for making some considerable alterations in the process of the common law; but it was thrown out in the house of lords. A long discourse on this topic of reforming the common law was written about this time, which *bishop Burnet* says he had seen. It is there complained, that the law of England was a barbarous kind of study, *and did not lead men into a finer sort of learning*; which made common-lawyers so unfit for negociating foreign affairs. It was therefore proposed by this author, that the common and statute law should be digested into a body under titles and heads, and put into good Latin, in imitation of the Roman laws (c); a proposal which, it should seem, was less necessary now than it ever had been, as *Fitzherbert's* and *Rastell's* works were new, and had at least made a great step towards a complete digest. The whim of imitating the Roman law so closely as to adopt its language, was taken up and executed by a writer in after-times (d); the success of which performance is a more decisive answer to the above project, that many arguments of expedience and propriety.

(a) Typ. Antiq. 809. (b) Ibid. 549. (c) Burn. Ref. vol. II. 91, 92.

(d) Dr. Cowel's *Institutiones Juris Anglicani*, published in the reign of James I.

An order was made in the society of the Inner Temple, in 3 and 4 Ph. and Ma. that thenceforth no attorney, or common solicitor, should be admitted into that house without the assent and agreement of their parliament (a).]

The grievance of long beards was not yet removed. We find an order was made in the Inner Temple, that no fellow of that house should wear his beard above three weeks growth, upon pain of forfeiting twenty shillings (b). In the Middle Temple, an order was made in 4 and 5 Ph. and Ma. that none of that society should wear great breeches in their hose, made after the Dutch, Spanish, or Almain fashion, or lawn upon their caps, or cut doublets, on pain of forfeiting 3s. 4d. : for the second offence, the offender was to be expelled.

In 3 and 4 Ph. and Ma. an order was made by the society of Lincoln's Inn, that thenceforth none should be admitted into that house, who had not been of an inn of chancery before, for the space of one year, unless he paid forty shillings at admittance (c). In 1 and 2 Ph. and Ma. a gentleman of Lincoln's Inn was fined five groats by a special order, for going in his study-gown in Cheapside on a Sunday about ten o'clock in the forenoon, and in Westminster-hall, in the term-time, in the forenoon (d).

In 3 and 4 Ph. and Ma. the following orders were agreed upon to be observed in all the four inns of court. That none of the companions, except knights or benchers, should wear in their doublets, or hose, any light colours, except scarlet and crimson; nor wear any upper velvet cap, or any scarf, or wings in their gowns, white jerkins, buskins, or velvet shoes, double cuffs on their shirts, feathers or ribbons on their caps, on pain of forfeiting 3s. 4d. and for the second offence, of expulsion. No attorney was to be admitted into any of the houses: and in all admissions thenceforward this condition

(a) Dugd. Orig. 147.

(b) Ibid. 148.

(c) Ibid. 242.

(d) Ibid. 243.

was to be implied: that if he who was admitted practised *attorneyship* he should be *ipso facto* dismissed, and have liberty to repair to the inn of chancery from whence he came, or to any one of them, if he were of none before. It was required, that none of the companies of such houses should wear their study-gowns into the city any further than *Fleet-bridge*, or *Holborn-bridge*; nor might they wear them as far as the *Savoy*, upon like pains as those before-mentioned. None of the said companions, when in commons, might wear Spanish cloaks, sword and buckler, or rapier, or gowns and hats, or gowns girded with a dagger on the back, upon the like pain.

The moot-cases in any of the houses of court were not to contain more than two points for argument: they were to be brought in pleading, and the puisne of the bench was to recite the whole pleading. None of the bench were to argue above two points; if any did, the Reader was to remonstrate with him, and correct it in future. Every reader of a court of chancery was to give the same orders about apparel, weapons, and study-gowns, to his house of chancery. Among the same regulations it was ordained, that none of the said companions under the degree of a knight, being in commons, should wear any beard above three weeks growth, on pain of forfeiting forty shillings, and double the sum every week after monition (a).

(a) Dugd. Orig. 310.

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